IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
JUL 24 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1977

NO. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Office and Post Office Addresses:

MORIARTY, LONG, MIKKELBORG & BROZ

By CHARLES T. YATES

3300 Seattle-First Natl Bank Bldg.
Seattle, WA 98154

Attorneys for Puget Sound Gillnetters Association

JOSEPH T. MIJICH/JOHN P. WORLD

3920 Bank of California Center
Seattle, WA 98164

Attorneys for Petitioner Purse Seine Vessel Owners Association

---

CALTEMAN PRESS/T WORD PROCESSING, SEATTLE

TABLE OF CONTENTS

Page

Petition For Writ Of Certiorari. 1

I. Opinions Below. 2

II. Jurisdiction. 3

III. Issues. 4

IV. Constitutional Provisions, Treaties, Statutes Involved 6

Treaties 6

V. Statement Of The Facts. 8

VI. Reasons For Granting Writ of Certiorari . . 19

A. The Conflict of Decisions by the Washington Supreme Court and the Federal District Court Require This Court's Review. 24

B. The Lower Court Has Decided A Federal Question In A Way In Conflict With Applicable Decisions of This Court. 27

C. The Rights Under These Indian Treaties Are an Important Question of Federal Law Which Should Be Settled By This Court. 30

D. The Lower Court Has Rendered a Decision On an Important State Question in a Way That Is In Conflict With State Law and the Decision of This Court 31

E. With the Sanction of the Court of Appeals, the Lower Court Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As To Call For an Exercise of This Court's Power of Supervision 33

F. The Effect of United States v. Washington IV is a Matter of Such Imperative Public Importance as to Justify Deviation from Normal Appellate Process 36

VII. Conclusion 40

APPENDICES:

A - Constitutional Provisions, Treaties A-1

B - Opinion
PSGA v. U.S. District Court
Filed 4/24/78 . . . . . .B-1

C - Preliminary Injunction re Enforcement of Limitations on Nontreaty salmon fisheries for 1978 and subsequent seasons C-1
Findings of Fact, Conclusions of Law
U.S. v. Washington 6/6/78

D - Preliminary Injunctions staying court injunction and order implementing preliminary injunction
U.S. v. Washington 8/31/77 . . . . . .D-1

E - Temporary Restraining Order re Enforcement of 1977 fisheries
U.S. v. Washington Filed 8/31/77 . . . . .E-1

F - Memorandum, Order and Preliminary Injunction
U.S. v. Washington Filed 8/31/77 . . . . .F-1

G - Memorandum Adopting Salmon Management Plan
U.S. v. Washington 8/31/77. . . . . .G-1

H - Preliminary Injunction re: Enforcement of 1977 fisheries
U.S. v. Washington 9/77. . . . . .H-1

Page

I - Order for Service of Notices regarding 1978 Enforcement Hearing
U.S. v. Washington 12/9/77 . . . . . .I-1

J - Opinion
U. S. v. Washington, 9th Cir.
No. 75-2835, 76-1042 . . . . . .J-1

K - National Marine Fisheries Services Letter. K-1

TABLES OF AUTHORITY

Table of Cases

Carroll v. Presidents and Commissioners of Princess Anne, 393 U.S. 175 (1968) . .. .35

Chase National Bank v. Norwalk, 291 U.S. 431 (1934). 34-35

Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943) 23, 24

Confederated Band of Ute Indians v. United States, 330 U.S. 169 (1947) 24

Department of Game v. Puyallup Tribe, Inc., 414 U.S. 44, 38 L. Ed. 2d 254 (1973) (Puyallup II) 28,29

Federal Trade Commission v. Raladum Co., 283 U.S. 643. 34

Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U.S. 78 (1898). 32,33

Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 667, __ P.2d __ (1977) . . . 11,24,31

Puyallup Tribe of Indians v. Department of Game, 391 U.S. 392, 20 L. Ed. 2d 689 (1968) (Puyallup I) 28,29,30

Page

Puyallup Tribe, Inc. v. Department of Game of the State of Washington, 45 L. Week 4837 (1977) (Puyallup III). 28

Supervisors of Carroll County v. United States ex rel. Reynolds, 18 Wall 71, (1873). 32

Tulee v. Washington, 315 U.S. 681, 861 L. Ed. 1115 (1941) 28

United States v. Choctaw Nation, 179 U.S. 494 (1900). 24

United States ex rel. Johnston v. County Court of Clark County, 95 U.S. 769, (1878). 32

United States v. Washington, 384 F. Supp. 312 (1974). 9-10,15,19,20-21,30,34

United States v. Washington, 520 F.2d 676 (1976). 10,21,29

United States v. Washington, 423 U.S. 1086 (1976). 16,21,23,36

United States v. Washington, 573 F.2d 1121 (1978). 36,37

United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089 (1905) 28

Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wn.2d 276, __ P.2d __ (1977) 24,26,29,31

Statutes

28 U.S.C. § 1254 3

Constitutional Provisions

U.S. Const., art. I § 8. 6
art. II § 2 6
art. II § 3 6
art. III § 1. 6
art. III § 2. 6
U.S. Const. amend. V 6

Other Authority

Treaty with the Makah (Treaty of Neah Bay), 12 Stat. 939. 7

Treaty of Medicine Creek, 10 Stat. 1132. 7

Treaty of Point Elliott, 12 Stat. 927. 7

Treaty of Point No Point, 12 Stat. 933 7

Treaty with the Quinaults (Treaty of Olympia) 12 Stat. 971. 7

Treaty with the Yakimas. 12 Stat. 951. 7

U.S. Supreme Court, Rule 20 4,36
Rule 23.5. 4

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. ___

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners, Puget Sound Gillnetters Association and Purse Seine Vessel Owners Association, hereinafter referred to as petitioners, pray that writ of certiorari issue to review:

1. The opinion and judgment of the United States Court of Appeals for the Ninth Circuit

entered in Puget Sound Gillnetters Association, v. United States District Court for the Western District of Washington, cause No. 77-3129;

2. The opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in United States v. Washington, cause Nos. 77-3654 and 77-3655;

3. Findings of Fact, Conclusions of Law, and Preliminary Injunction re: Enforcement of Limitation on Non-Treaty Salmon Fisheries for 1978 and subsequent seasons entered by the United States District Court, Western District of Washington, at Tacoma, United States v. Washington, No. 9213 (June 6, 1978).

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Puget Sound Gillnetters Association v. United States District Court For The Western District of Washington and United States v. Washington, as reported in 573 F.2d 1123 (1978), appears in Appendix B, and will

hereinafter be referred to as United States v. Washington III.

The Findings of Fact, Conclusions of Law and Preliminary Injunction Re: Enforcement of limitation on non-treaty salmon fisheries for 1978 and subsequent seasons entered by the United States District Court Judge for the Western District of Washington at Tacoma, George H. Boldt, in United States v. State of Washington, are unreported, are set forth in Appendix C, and will hereinafter be referred to as United States v. Washington IV.

II.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit in United States v. Washington III was issued on April 24, 1978. The Findings of Fact, Conclusions of Law and Preliminary Injunction issued by the United States District Court, Western District of Washington in United States v. Washington IV was rendered June 6, 1978. The jurisdiction of this court is invoked under 28 U.S.C. § 1254. This single petition is

filed pursuant to Rule 23.5 of this Court because the court of appeals rendered a single decision in the matters of Puget Sound Gillnetters Association, et al. v. United States District Court, supra, and United States v. Washington III, supra. Writ of certiorari is sought in United States v. Washington IV pursuant to Rule 20 of this Court prior to judgment by the court of appeals because the matter is of such imperative public importance as to justify the deviation from normal appellate processes.

III.

ISSUES

Is Judge Boldt's interpretation of the treaty language correct, and, if not, is the injunction issued pursuant to that interpretation invalid?

2. Is an individual who conducts business in a state, in such privity to that state, that a court may directly enjoin the citizen without his being a party to or a participant in the cause of action in which the State is a party? Assuming privity, if an injunctive order is sought against

an individual, is that individual entitled to notice of and participation in the injunctive hearing prior to its issuance?

3. Are the Indian treaties non-self-executing, and non-justiciable, thereby precluding judicial implementation?

4. Did Judge Boldt exceed his authority by ordering the Department of Commerce and Transportation to involve themselves in the management of Puget Sound salmon when the executive branch has no statutory authority to do so?

5. Is an allocation of over 50% of the salmon resource to less than 1% of the population of a state or an allocation of over 80% of the commercially harvested salmon to less than 17% of the commercial fishermen an abuse of discretion in the utilization of its equitable powers by a court?

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

Constitutional provisions, treaties, and statutes involved are as follows and are reproduced in Appendix A, infra, pp. A-1 to A-__.

(1) Constitutional Provisions of the United States

(a) Article I, § 8, Powers of Congress A-1

(b) Article II, § 2, Powers of the President A-2

(c) Article II, § 3, Powers and Duties of the President A-3

(d) Article III, § 1, Judicial Powers A-3

(e) Article III, § 2, Jurisdiction of The Federal Courts A-3

(f) Amendment V - Due Process A-4

Treaties

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. The six treaties are:

(a) Treaty of Medicine Creek, 10 Stat. 1132 (1854). A-5

(b) Treaty of Point Elliott, 12 Stat. 927 (1855). A-5

(c) Treaty of Point No Point, 12 Stat. 933 (1855). A-6

(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939 (1855). A-6

(e) Treaty with the Quinaults (Treaty of Olympia), 12 Stat. 971 (1855). A-6

(f) Treaty with the Yakimas, 12 Stat. 951 (1855). A-7

Those six treaties each contain a similar provision, and only that provision is repeated in the appendix. The following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing together with the privilege of hunting, gathering roots and berries, . . . on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

V.

STATEMENT OF THE FACTS

This proceeding is before this Court to establish entitlement to manage and harvest the salmon resource in Puget Sound, State of Washington. The value of this resource approaches, in an unprocessed state, $50,000,000 each year. Salmon, of which there are five species in Puget Sound, chinook, coho, chum, pink and sockeye, are anadromous fish that spawn in fresh water, migrate into the Pacific Ocean and then return to fresh water to spawn and die.

Prior to the settlement of the Northwest by non-Indians, salmon was a staple of the Indian tribes living in the Puget Sound region. In the mid-1850's the United States entered into a series of treaties with Indians in the Puget Sound region, which provided for the movement of the various Indians onto reservations but granted to the Indians: "[T]he right of taking fish, at all usual and accustomed grounds and stations, . . . in

common with all citizens of the territory." (See Appendix A).

As methods for the preservation and canning of salmon developed, the value of the resource increased. Fishing on salmon stocks grew until it became necessary for the State of Washington to undertake management of the resource in order to conserve it. It was the State of Washington's efforts to conserve the salmon that created the conflict between the State of Washington and various treaty tribes over the Indians' entitlement to harvest salmon contrary to regulations adopted by the State. This battle resulted in the filing of the suit which is the underlying basis for this application.

The United States, in its capacity as trustee for various Indian tribes in the State of Washington, filed a complaint against the State alleging that the State's statutory and regulatory scheme for managing the salmon fishery was interferring with the fishing rights of various Indian tribes. Judge Boldt, in United States v. Washington, 384 F.

Supp. 312 (1974), found that the State of Washington through its statutes and regulations did interfere with the treaty granted fishing rights of the various tribes and further interpreted those treaty rights to include a guarantee of an opportunity to harvest at their usual and accustomed off reservation fishing grounds 50% of the salmon not necessary for conservation.

During the pendency of the case, Judge Boldt denied intervening party status various non-treaty individuals and assocations who were involved in the commercial or recreation harvest of salmon. He did grant party status to the various tribes located in the Pacific Northwest whose interests were represented by the United States government.

Following his decision and its affirmation by the Ninth Circuit Court of Appeals, United States v. Washington, 520 F.2d 676 (1976), Judge Boldt continued to exercise jurisdiction over the matter and issued a series of directives to the State of Washington requiring that it issue regulations governing the harvest of salmon by non-treaty commercial fishermen in order to allow

treaty fishermen a guaranteed number of salmon. The State of Washington issued these regulations, and the non-treaty commercial fishermen challenged their validity in Washington State courts. These challenges included an application for writ of mandamus filed with the Washington State Supreme Court on behalf of the two fishing associations representative of the majority of non-treaty commercial fishermen. As a result of this application, the Washington State Supreme Court issued its decision in Puget Sound Gillnetters Ass'n v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977), in which the State Supreme Court concluded that neither the State Constitution nor its statutes permitted the State through its Department of Fisheries to restrict non-treaty fishermen in order to allocate salmon to treaty fishermen. Additionally the Washington State Supreme Court concluded that Judge Boldt had erred in his interpretation of the Indian treaties. The court found that the "in common with" language of the treaties entitled individual Indians to access to their fishing

grounds and an equal opportunity to participate in the salmon fishery with non-Indians. The court further found that Judge Boldt could not require by his injunctive authority a State agency to act beyond its authorized statutory powers. An application for writ of certiorari has been filed in this case and is pending before this Court (Puget Sound Gillnetters Association v. Moos, petition for cert. filed, no. 77-983 (Jan. 6, 1978).

Despite the decision by the Washington Supreme Court defining the authority of the Department of Fisheries, Judge Boldt continued to issue mandates to the Department of Fisheries requiring the promulgation of regulations restricting nontreaty fishermen in order to effect his allocative scheme (See Appendix D). The Department of Fisheries issued the regulations as required but was unable to enforce them through the State courts because of the Washington State Supreme Court decision. As a result there was no effective method for the implementation of Judge Boldt's decision except through his direct intervention. See Appendix E.

In August of 1977, a series of orders and two preliminary injunctions were issued directly against commercial non-treaty fishermen and associations prohibiting commercial salmon fishing (See Appendices E & F). These orders and injunctions were issued with no notice to the fishermen or their associations. Also, during the month of August 1977, Judge Boldt issued a number of injunctive orders which provided among other things:

1. That the State of Washington enforce regulations that its supreme court had determined to be beyond the scope of the authority of the State to act; Appendix D.

2. That the State courts were not to interfere with the implementation of the State regulations, although they had been determined to be contrary to State law by the state supreme court; Appendix D.

3. An estimate of salmon available for harvest in 1977, and ordered the numbers of salmon to be harvested by each of the treaty and non-treaty fishermen; Appendix F.

4. A plan for the management of salmon harvest on Puget Sound for the next five years; Appendix G.

5. Ordered the United States through its agencies and officers to take all steps necessary to insure an orderly harvest of salmon on Puget Sound and to preserve the salmon runs; Appendix E.

All of the foregoing orders were proposed and drafted by the United States. On September 27, 1977, at the request of and in the form proposed by the United States, Judge Boldt issued a preliminary injunction which closed Puget Sound to all net fishing by non-treaty fishermen. The fishermen were not parties to the case nor allowed to participate in the hearing. Included in the order was a directive to various federal agencies to involve themselves directly in the enforcement of the terms of the order. As a result of this injunction, the Department of Commerce through its National Marine Fisheries Service Officers served the injunctive order on non-treaty fishermen and issued citations to fishermen found to be in violation of the order. Approximately 27 citations

were issued and to the date of this application, four non-treaty commercial fishermen have been found guilty of contempt for fishing contrary to the injunctive order of the court and have each been sentenced to 60 days in jail. The remainder are still pending trial. Those individuals who have been tried and sentenced to jail have appealed to the Ninth Circuit Court of Appeals for relief.

The State of Washington filed an appeal from the issuance of the injunctive order of September 27, 1977 and the Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association filed an application for writ of mandamus with the Court of Appeals for the Ninth Circuit. The associations challenged:

1. The authority of Judge Boldt to enjoin fishing by non-treaty fishermen when the fishermen were not parties to United States v. Washington nor provided notice of the hearing or and an opportunity to participate therein prior to the issuance of the injunction;

2. The authority of Judge Boldt to involve himself in the management of the salmon resource;

3. The authority of Judge Boldt to enforce a non-self-executing treaty for which no implementing legislation had been adopted;

4. The correctness of Judge Boldt's interpretation and implementation of treaty rights as a result of the treaty provisions allowing "the right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory;"

5. The utilization of a federal agency in a manner not authorized by that agency's enabling statutes.

The Ninth Circuit Court of Appeals, United States v. Washington III, found:

1. That Judge Boldt's interpretation of the Indian treaties was within his equitable powers;

2. That commercial fishermen were in privity with the State and therefore their interest was represented by the State in the litigation and the court could proceed directly against the fishermen; and

3. That the treaties are self-executing.

Petitioners are commercial fishing associations which represent a majority of the commercial salmon harvesters in Puget Sound. Judge Boldt's orders since his original decision in 1974 have resulted in the reduction of fishing time in South Puget Sound by non-treaty commercial net fishermen from a pre-1974 authorization of in excess of 130 days to an authorization in 1976 of three days for the total season. If similarly restricted in the future, the approximately 2,000 commercial net fishermen on Puget Sound will be financially ruined.

On December 7, 1977, Judge Boldt ordered the State of Washington to not issue any net salmon fishing licenses for 1978 or subsequent seasons. He set a hearing on the United States' motion for an injunction comparable to the one issued in 1977 and ordered any individual or organization wishing to appear at that hearing to file a Notice of Appearance and a Memorandum setting forth objections to the proposed 1978 injunction, copies of this order and the proposed

injunction were served on a large number of commercial fishermen. A hearing on the proposed injunction for 1978 and subsequent salmon fishing seasons was held on April 5, 6, and 24, 1978. A number of commercial fishermen appeared at that hearing with two being represented by counsel. The court allowed the fishermen appearing to make a statement but refused the fishermen the right to call witnesses on their behalf and the right to examine witnesses. Following the hearing, a preliminary injunction was issued for the enforcement of limitations on non-treaty salmon fisheries for 1978 and subsequent seasons. The order provided among other matters:

1. That Puget Sound by non-treaty fishermen were prohibited from net fishing at all times unless authorized by Judge Boldt;

2. That personnel of the National Marine Fisheries Service, and the Coast Guard, may board fishing vessels for the purpose of investigating suspected violations of this injunction;

3. That the Coast Guard and National Marine Fisheries Service shall serve copies of the injunction on fishermen; and

4. That the State of Washington is required to cite any fisherman fishing contrary to Judge Boldt's orders.

VI.

REASONS FOR GRANTING WRIT OF CERTIORARI

On February 12, 1974, Judge Boldt rendered "final decision number 1" in United States v. Washington, 384 F. Supp. 312 (1974). Although the decision was quite lengthy (110 pages) it was primarily a recitation of facts and a restatement of Indian treaty law. Two aspects of the decision, however, were substantial departures from the existing body of judicial decision, and have resulted in chaos in the management of the Puget Sound Salmon fisheries. Judge Boldt:

A. Exempted to a large degree Indian fishermen from the regulatory authority of the State Management Agency;

B. Quantified the treaty Indians opportunity to fish.

Judge Boldt based his decision on the following treaty clause: "The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory; . . ."

Judge Boldt in his original decision relied upon an 1862 edition of Webster's American Dictionary of the English language and found that the term "in common with" entitled treaty fishermen to the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations. See United States v. Washington, 384 F. Supp. 312, 343, 356 (1974). Judge Boldt also found that the State of Washington could not use its laws and regulations to manage fishing by treaty fishermen unless it could be shown that such restrictions were reasonable and necessary to preserve and maintain the resource and that all non-treaty fishermen had first been fully restrained from fishing. See United States v. Washington, supra,

at 342, 405-409. The judgment of the lower court was appealed to the Court of Appeals for the Ninth Circuit. That court in its decision United States v. Washington, 520 F.2d 676 (1976), examined Judge Boldt's interpretation of the "in common with" clause and found that it was not an abuse of his equitable powers to apportion the opportunity to harvest fish. In emphasizing the importance that the apportionment be of opportunity rather than fish, however, the court of appeals stated:

> The District Court's apportionment does not purport to define property interest in the fish; fish in their natural state remain free of attached property interest until reduced to possession. Rather the Court decreed an allocation of the opportunity to obtain possession of a portion of the run.

520 F.2d at 687 (citations omitted).

The United States Supreme Court denied an application for writ of certiorari to review the decisions of Judge Boldt and the Ninth Circuit Court of Appeals. United States v. Washington, 423 U.S. 1086 (1976).

Judge Boldt retained jurisdiction of the matter and has, since the decision, effectively

become the sole manager of the Puget Sound salmon resource. During his retention, however, he has substantially altered his 1974 decision. It is the substantial alterations which are the basis for this application for writ of certiorari. The orders which are challenged here guarantee an actual number of fish to the treaty Indians rather than guaranteeing them an "opportunity" to participate in the harvest of salmon at their usual and accustomed fishing grounds. In his Memorandum, Order and Preliminary Injunction (Appendix F) Judge Boldt set out actual numbers of fish to be harvested by treaty and non-treaty fishermen. He did this both in terms of absolute numbers and percentages. Then, in order to effect this allocation of fish, Judge Boldt proceeded from his original concept of restricting the State of Washington in its management of treaty fishermen to directly prohibiting non-treaty fishermen from harvesting salmon (See Appendices H and E).

Despite these substantial changes by Judge Boldt in his interpretation of treaty entitlements

and methods of implementation, the court of appeals refused to review the interpretation of the Indian treaties which Judge Boldt has now made.

The court of appeals did reaffirm its incorrect belief that Judge Boldt's interpretation of the treaty is defensible as an appropriate use of his equitable power. United States v. Washington III, Appendix B-1.

The court found that the guarantee of fish to treaty Indians was an equitable partitioning of a co-tenancy. Aside from the fact that it is wholly inappropriate to apply this concept to a wildlife resource (See United States v. Washington III, Appendix B-22 concurring opinion Judge Kennedy), the any use of equity concepts in interpreting Indian treaties is incorrect.

In Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943), the Supreme Court after acknowledging the liberal view relied on below went on to say, in reversing the lower court decision which was based upon "findings" of Indian intent:

> But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. [Citations omitted].

318 U.S. at 432. See also, Confederated Band of Ute Indians v. United States, 330 U.S. 169 (1947); United States v. Choctaw Nation, 179 U.S. 494 (1900).

The court of appeals and Judge Boldt are destroying an industry and a resource with a wrong interpretation of Indian treaties.

A. The Conflict of Decisions by the Washington Supreme Court and Judge Boldt Require This Court's Review

There is presently before this Court an application for writ of certiorari, cause no. 77-983, in the matter of Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wn.2d 276, __ P.2d ___ (1977) and Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677,565 P.2d 1151 (1977). In these decisions the Washington State Supreme Court found that the various Indian treaties with their "in common with"

clauses guarantee to the Indians access to their usual and accustomed fishing places and prohibit restraints on Indian fishing at those places except to the extent that regulations which are necessary conservation measures restrain the fishing rights of all citizens. The court rejected Judge Boldt's decision which interprets the treaties as granting an absolute number or percentage of fish to Indians. The results of these conflicting decisions in the state and federal courts have been disastrous in terms of impact upon the salmon resource and the salmon fishing industry. Some non-treaty commercial fishermen relying upon the protection of the decision of the Washington State Supreme Court have attempted to participate in the harvest of salmon in Puget Sound. They have been charged with contempt by Judge Boldt and sentenced to jail. Some have attempted to comply with Judge Boldt's orders and have been financially ruined. Judge Boldt has ordered various Federal agencies to interdict this fishery. The result has been an enforcement and management nightmare resulting

in gun point confrontations and, in at least one case, the near loss of human life. Federal agents, ill-equiped and unknowledgeable in the problems of fisheries management, are confronted by commercial fishermen whose economic life is dependent upon their fishing consistent with the Washington State Supreme Court rulings and in violation of Judge Boldt's orders. The resolution of this conflict in judicial decisions lies exclusively with the United States Supreme Court. As the Washington Supreme Court stated in Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1977):

> The resolution of this question cannot come from this court or the Federal District Court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding on both of us. In short this dilemma can be resolved only by the Supreme Court of the United States . . . .

Perhaps the most compelling reason for this Court to review the lower court's interpretation and implementation of the Indian treaties is the absolute frustration felt by the non-treaty commercial fishermen as a result of their attempts

to utilize the judicial system to protect their industry. They first sought protection in their state supreme court. That court agreed with them only to have Judge Boldt use federal executive agencies to neutralize the decision. They then sought relief in the United States court of appeals where two of those judges stated: "It has not been clearly demonstrated that the rule of 50% apportionment is a necessary and proper implementation of [the Indians] treaty right." (Concurring Opinions of Judges Wallace and Kennedy. Appendix B-22 - B-30).

Despite two appellate court determinations that Judge Boldt's decision is not "proper" it continues to be enforced. The fishermen cannot understand why these courts agree with them and they still receive no relief from their plight.

B. The Lower Court Has Decided A Federal Question Contrary to Past Decisions of This Court

The United States Supreme Court has been called upon on numerous occasions to interpret the treaty provision which is at issue here. See

United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089 (1905) (Winans); Tulee v. Washington, 315 U.S. 681, 861 L. Ed. 1115 (1941) (Tulee); Puyallup Tribe of Indians v. Department of Game, 391 U.S. 392, 20 L. Ed. 2d 689 (1968) (Puyallup I); Department of Game v. Puyallup Tribe, Inc., 414 U.S. 44, 38 L. Ed. 2d 254 (1973) (Puyallup II); Puyallup Tribe, Inc. v. Department of Game of the State of Washington, 45 L. Week 4837 (1977) (Puyallup III).

In Winans, the Court found that "the right of taking fish at all usual and accustomed places in common with the citizens of the territory" was a guarantee of access to the fishing grounds to the Indians.

In Tulee, the Court found that the treaty provision leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish but it forecloses the state from charging the Indians a fee.

In Puyallup I the Court found that the right to fish at all usual and accustomed places may not be qualified by a state but the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state in the interest of conservation, provided, that the regulations meet appropriate standards and do not discriminate against the Indians.

In Puyallup II the Court found that the right of equal protection was implicit in the phrase "in common with."

Judge Boldt in United States v. Washington has moved the "in common with" language from being a shield against State interference with treaty fishing to becoming an affirmative obligation on the part of the State and Federal government to tp guarantee a number of fish to the tribes. This interpretation is blatantly inconsistent with the equal protection interpretation found in Puyallup I and II.

Judge Boldt's attitude toward Puyallup I & II, however, is reflected in his analysis of

these decisions. In United States v. Washington, 384 F. Supp. 312 (1974) at 337-8, Judge Boldt states in reference to Puyallup I:

> If that seeming nonsequiter be the law, it certainly is deserving of more specific legal analysis and justification than it has ever had in any U.S. Supreme Court decision. . . .
>
> It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing.

C. The Rights Under These Indian Treaties Are an Important Question of Federal Law Which Should Be Settled By This Court

Even assuming that Judge Boldt's decision is not in conflict with the decisions of this Court, it certainly raises an important question of federal law which has not been but should be settled by this Court. Potential destruction of an industry and a natural resource by judicial fiat certainly requires at least that the fiat be from this country's highest court.

D. The Lower Court Has Rendered a Decision On an Important State Question in a Way That Is In Conflict With State Law and the Decisions of This Court

The Washington State Supreme Court in Puget Sound Gillnetters Ass'n v. Moos, supra, found that regulations promulgated by the Washington State Department of Fisheries for the purpose of allocating salmon between user groups and not based solely upon the need for conservation were beyond the authority of that agency to act and therefore void and unenforceable.

Following the decision and with full knowledge of the state supreme court interpretation of State law restrictions on the authority of an agency to act, Judge Boldt ordered:

> The defendants [State Department of Fisheries] are required to enforce the regulations providing for management and control for purposes of conservation and over the non-treaty allocation share so that the treaty allocation shall not be encroached upon.

See, Appendix D, p. D-1.

In ordering a state agency to disobey a decision of the State's highest court, Judge Boldt

is very effectively deciding an important state question in direct conflict with the applicable state law.

Judge Boldt's attempt to expand the authority of a state agency beyond its enabling statues, not only conflicts with state law, but it is in direct conflict with the decisions of this Court.

This Court has stated clearly that a federal court will not compel state governmental officers to do any act which they are not authorized to do by the laws of the state from which they derive their power. Supervisors of Carroll County v. United States ex rel. Reynolds, 18 Wall 71, (1873); United States ex rel. Johnston v. County Court of Clark County, 95 U.S. 769 (1878); Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U.S. 78 (1898).

In Missouri v. Murphy, supra, the Court stated at 962: "Mandamus lies to compel a party to do that which it is his duty to do but can confer no new authority, and the party to be coerced must have the power to perform the act."

Following at 964, the Court stated:

> The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the Board of Public Improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform.

(emphasis added).

E. With the Sanction of the Court of Appeals, Judge Boldt Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As To Call For the Exercise of This Court's Power of Supervision

Judge Boldt fails to recognize any bounds on his judicial authority. As indicated above, he had no reluctance in ordering a state agency to perform acts it clearly was not authorized to do.

But in addition to involving himself in the management of the State of Washington affairs, Judge Boldt has undertaken to expand the authority of the federal executive agencies. Despite the total lack of any statutory authority to do so, Judge Boldt has ordered the direct involvement of the Department of Commerce and the Department of Transportation in the management of Puget Sound origin salmon stocks. See Appendices E, H, and C.

See also the letter from Terry L. Leitzell, assistant administrator for Fisheries, National Marine Fisheries Service, to Hon. John E. Cunningham, Appendix K, which states in part, "[U]nder U.S. v. Washington, the Executive Branch is required to adopt strategies which will accomplish the intent of the decision. . . ." The extension of executive powers beyond the terms and necessary implications of the statutory grant by a court is wholly improper. Federal Trade Commission v. Raladum Co., 283 U.S. 643 (1931).

The non-treaty fishermen have a constitutionally protected entitlement to work. Judge Boldt eliminated this right by giving no notice and allowing no opportunity to oppose, to present evidence or to examine witnesses. The court of appeals justifies this by finding the fishermen "in privity" with the state, thereby having no right to due process prior to the loss of their right to work.

This Court has refused to allow the judicial use of injunctive powers against a non-party. Chase National Bank v. City of Norwalk, 291 U.S.

431 (1934). This Court has condemned the use of injunctive powers without notice and a hearing. Carroll v. Presidents and Commissioners of Princess Anne, 393 U.S. 175 (1968). This Court should not allow a circumvention of these prohibitions through such an unsupported theory.

Independent of its impact on the petitioners, this Court should undertake review of the court of appeals decision sustaining such broad use of injunctive powers because of the incredible potential for abuse. That court found privity because the fishermen's interest is derivative of the state's interest. Every corporation in every state is a derivative of the state. By the logic of the court of appeals anyone seeking relief from a corporation then may sue the state of incorporation and there is no entitlement on the part of the business of notice or participation in the judicial hearings and it will be bound by the court decrees obtained.

F. The Effect of United States v. Washington IV is a Matter of Such Imperative Public Importance as to Justify Deviation from Normal Appellate Process

Writ of certiorari is sought in United States v. Washington IV pursuant to Rule 20 of this Court prior to judgment by the court of appeals because the matter is of such imperative public importance as to justify the deviation from normal appellate processes.

The Findings of Fact, Conclusions of Law and Preliminary Injunction rendered in United States v. Washington IV, which were appealed to the United States Court of Appeals for the Ninth Circuit by Notice of Appeal on July 19, 1978 (Court of Appeals No. 78-2523) are identical in nature and impact to the orders which were challenged and examined by the Court of Appeals in United States v. Washington III. The orders examined by the court of appeals were issued for the 1977 fishing season and the Findings of Fact, Conclusions of Law and Injunction issued June 6, 1978, will regulate the fishing season for 1978 and following seasons. A second

review of the same concepts by the court of appeals would be redundant.

The court of appeals in a decision on other issues raised in United States v. Washington, 573 F.2d 1118 (1978) (Appendix J) discussed the issues raised herein:

> It must be quite apparent that the case tendered for our decision here would require us to address procedural questions that touch upon fundamental principles controlling the delicate balance of state and federal power. Beyond these questions we would further be required to interpret substantive rights of the parties under United States v. Washington that are of great significance to the fishing industry in the Northwest. We would not serve the vital interests of the parties by addressing such questions in a hypothetical case while other pending cases present the issues in an active context.

573 F.2d at 1121.

Because the court of appeals has already ruled on the issues raised by the Injunction of June 6, 1978 and because a resource and an industry are in immediate jeopardy, it is appropriate that this Court deviate from normal appellate processes and review the Injunction of June 6, 1978.

VII.

CONCLUSION

For the above reasons, writs of certiorari should issue to review the opinion of the court of appeals and the Findings of Fact, Conclusions of Law and Injunction of the lower court.

Respectfully submitted,

MORIARITY, LONG, MIKKELBORG & BROZ

By CHARLES T. YATES

Attorneys for Puget Sound Gillnetters Association

JOSEPH T. MIJICH/JOHN P. WORLD

Attorneys for Petitioner Purse Seine Vessel Owners Association

APPENDIX A

CONSTITUTIONAL PROVISIONS, TREATIES

ARTICLE I, SECTION 8

POWERS OF CONGRESS. The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training hte militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and al other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

ARTICLE 2, SECTION 2

POWERS OF THE PRESIDENT. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice

and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3 POWERS AND DUTIES OF THE PRESIDENT. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

ARTICLE III

§ 1 JUDICIAL POWER, TENURE OF OFFICE. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2 JURISDICTION. The judicial power shall extend to all cases, in law and equity, arising under

this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.*

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

*Note: Clause changed by Amendment XI.

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TREATIES

TREATY OF MEDICINE CREEK

December 26, 1854

10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultimvated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855

12 Stat. 927

ARTICLE V. The right of taking fish at usual and accumstomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY OF POINT NO POINT

January 26, 1855

12 Stat. 933

ARTICLE 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States and erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855

12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE QUINAIELTS

July 1, 1855

12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses

for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take from any beds staked or cultivatged by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

TREATY WITH THE YAKIMAS

June 9, 1855

12 Stat. 951

ARTICLE III. And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

APPENDIX B

OPINION

PSGA v. U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUGET SOUND GILLNETTERS ASSOCIATION, et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, Respondent, UNITED STATES OF AMERICA, et al., Real Parties in Interest.	No. 77-3129
COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, INC., et al., Petitioners-Appellants, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, Respondent, and UNITED STATES OF AMERICA, et al., Real Parties in Interest-Appellees.	No. 77-3208 No. 77-3209
UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees, v. STATE OF WASHINGTON, et al., Defendants-Appellants.	No. 77-3654 No. 77-3655 OPINION

Appeal from the United States District Court for the Western District of Washington

Before: GOODWIN, WALLACE, and KENNEDY, Circuit Judges.

GOODWIN, Circuit Judge:

These consolidated appeals are the latest in a series of efforts by agencies of the State of Washington and various associations of non-Indian fish catchers to overturn decisions of the District Courts of Oregon and of the Western District of Washington apportioning between treaty Indians and others the right to take fish. See United States v. Washington, 385 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969); United States v. Oregon, 529 F.2d 570 (9th Cir. 1976). The geographic areas covered by these appeals are Puget Sound, the Washington coast south to and including Gray's Harbor, and the Columbia River.

I Background

Litigants reached an agreement concerning the Columbia River, and that agreement was incorporated in a final decree of the District Court, Order of February 28, 1977, United States v. Oregon. That case retains minor problems of enforcement.

Agencies of the State of Washington and various of its constituencies continue to attack the judgment in United States v. Washington. Accordingly, we will again set forth the treaty basis of that decision and reaffirm its validity. The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegration cases (see Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), cert. denied sub nom. McDonough v. Morgan, 426 U.S. 935 (1976); Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), cert.

denied, 429 U.S. 1042 (1977)), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

When Europeans first came to the Northwest, they found it occupied by many bands of Indians, who together exercised superficial control over the entire territory. The Indians knew nothing of English land tenure, but they were destined to learn.

For most tribes living along Puget Sound, the Pacific Coast, or a major stream, the yearly runs of anadromous fish were central to their economies and their cultures. As settlement from the East increased during the 1840's and 1850's, the white settlers created political pressure to limit Indian occupation to designated lands so that more land would be available to the settlers for enclosure and exclusive possession. Under instructions from the federal government, Governor Isaac Stephens of Washington Territory negotiated a series of treaties in 1854-55 to achieve settlement goals.

The treaties followed a pattern, the Treaty of Medicine Creek, 10 Stat. 1132 (1854), being typical. In article II the Indians reserved to themselves certain lands for reservations, and in article III the government further guaranteed them the right to continue taking fish at their usual and accustomed sites off the reservation, in common with all citizens of the Territory. This court has previously construed these clauses in earlier chapters of this litigation. We held that article II reserved an exclusive right to fish on the reservation and that article III established something analogous to a cotenancy, with the tribes as one cotenant and all citizens of the Territory (and later of the state) as the other. United States v. Washington, 520 F.2d at 685, 690. It is crucial to remember that these

treaties did not grant the tribes anything; rather, the tribes granted the United States a vast expanse of land, reserving to themselves certain interests in it and in its profits a prendre.[1] The negotiations and treaties show that the right to take fish was to the Indians one of the most important rights reserved.

These rights were reserved, not by the individuals who happened to be alive in 1854 or 1855, but by tribes, with which the United States treated as sovereign entities.[2] See United States v. Washington, 520 F.2d at 688. The sovereignty of Indian tribes was the legal foundation for the relations between the United States and the Indians from the origins of this country, even though tribal sovereignty was viewed as the limited sovereignty of a domestic dependent nation. Under the Constitution, only the United States may deal with an Indian tribe. Cherokee Nation v. Georgia, 30 U.S. (5. Pet.) 1, 17-19 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-60 (1832). All Indians are now citizens of the United States, 8 U.S.C. § 1401(a)(2), and the United States has not made treaties with the tribes since 1871, 25 U.S.C. § 71. As we noted in United States v. Washington, 520 F.2d at 685, tribal sovereignty does not fully explain current Indian status. Yet, as we also noted there, the concept of tribal sovereignty remains necessary to explain the extent of the tribes' reserved rights under the treaties, which have not been affected by the changes.

The Supreme Court has recently indicated that tribal sovereignty continues as a necessary part of Indian law. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), it overturned a state tax on income earned by a reservation Indian from reservation sources. In doing so it noted that tribal sovereignty provides a backdrop against which treaties and statutes must be read. The Indian claim to sovereignty long predates that of the United States or of any state. Indians on reservations

remain a separate people, exempted from many laws of the state within whose borders they live. 411 U.S. at 172-73. In Morton v. Mancari, 417 U.S. 535 (1974), the Court upheld a hiring preference for Indians in Bureau of Indian Affairs positions. It noted that the preference was political, not racial, 417 U.S. at 553 n.24, given to "members of quasi-sovereign tribal entities," 417 U.S. at 554. In United States v. Mazurie, 419 U.S. 544 (1975), the Court upheld the power of Congress to delegate to an Indian tribe the right to regulate the sale of liquor on non-Indian land within an Indian reservation. The Court specifically rejected the Tenth Circuit's holding that Indian tribes are simply voluntary associations of private citizens, citing Worcester and McClanahan among other cases. 419 U.S. at 557.

Most recently, the Court held unanimously that a conviction by a tribal court does not bar federal prosecution for the same offense, because the tribal and federal courts are arms of different sovereigns. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, ___ U.S. ___, ___, 46 U.S.L.W. 4243, 4246 (1978).

II Equal Protection

The state and the non-Indian fish catchers argue that to treat Indian fish catchers differently from non-Indians in allocating fishing opportunities and determining fishing regulations is a patent violation of basic equal protection principles. The Washington state courts have accepted this argument. See Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977). Yet the most obvious conclusion from this background is that "equal protection" is an issue in this case only as it limits the state's regulation of Indian fishing in those areas where the state

has a right to regulate. Comparisons between the numbers of treaty and nontreaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law. The treaty tribes reserved their preexisting rights to fish, and they continue, as quasi-sovereign entities, to hold those reserved rights.

As we pointed out in United States v. Washington, 520 F.2d at 685, the treaties established something analogous to a cotenancy in the off-reservation fishery.[3] The treaty fishers derive their rights from one of the cotenants, the tribes. The nontreaty fishers derive their rights from the other, the state as the successor to the United States. The population-head-count disparity is the unremarkable result of normal principles of property law applied to changing numbers within cotenant classes.

Treaty fishers fish under the regulation of one quasi-sovereign, nontreaty fishers under the regulation of another. The rights of each sovereign are reserved or granted in the treaties, as the district court and this court have authoritatively construed them. These principles, applied in good faith, should answer most of the state's arguments; the problem is then one of enforcement.

III Enforcement

A

Enforcement is a problem because the state, its courts, and the non-Indian fishers have never fully accepted the principle that treaty rights can be claimed by a politically impotent minority. Before 1977 the state enforced the district court's orders grudgingly at best.[4] The current crisis is the result of a breakdown in state law enforcement in 1977. The state agencies had, with well-publicized reluctance, issued fishing regulations which, if enforced, would have met the district court's requirements. The agencies found, however,

that some state prosecutors refused, again with the vocal approval of their constituents, to prosecute violations of the regulations in the few instances where the state issued citations. More important, the Washington Supreme Court in a recent series of decisions attempted to strip the state agencies of their power to comply with the district court's orders.

In Puget Sound Gillnetters Association v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977), and Purse Seine Vessel Owners Association v. Moos, 88 Wash. 2d 799, 567 P.2d 205 (1977), the court held certain regulations which the state Department of Fisheries issued to comply with the district court's orders to be beyond the Department's authority under state law.[5] The Department thereupon withdrew its regulations and issued new ones which made no attempt to protect tribal rights in the fishery. This situation led the district court to cease its attempts to work through the state government and, instead, to undertake fishery management directly. The court's enforcement actions are the special focus of the present appeal.

The tribes have a right to the enforcement of the treaties. This court has previously upheld the district court's construction of those treaties. The state was a party to that construction and remains a party now. The state is bound by the previous decisions.

The district court might have required the state to comply with its orders despite the conflicting state court rulings, but a direct confrontation would have raised serious questions of federalism. In an effort to minimize friction in a delicate state-federal situation without denying the tribes the rights they reserved in the treaties and vindicated in court, the district court entered into the direct management of the fishery. Unless or until Congress acts to harmonize state and treaty interests in the fishery, the default of state government leaves the district court as the only instrument available to vindicate the treaty rights.

The pertinent questions, therefore, are not whether the court was right or wrong in 1974, but whether the court's actions are reasonable now. A subsidiary question is whether the court may enforce its orders against "nonparty" fishers directly.

B

We held in United States v. Washington, 520 F.2d at 687-90, that the district court had discretion in its allocation of the fishery; we now extend that holding to recognize its broad discretion in managing the fishery. Further, none of the district court's actions now before us constitutes an abuse of that discretion.

The district court's orders set forth an allocation of fishing opportunity[6] between the treaty and nontreaty fishers intended, for 1977 only, to provide nontreaty fishers with 55% of the total opportunity and treaty fishers with 45%. Because the district court included the amount taken in close-in ocean waters in the estimate of the total opportunity available to nontreaty fishers, the allocations generally pushed upward the opportunity in Puget Sound and the coastal streams for treaty fishers.[7] The difference in technology between white and Indian fishers is explained in United States v. Washington, and in the voluminous record here. The district court made its allocation orders upon the best technical advice available. It made its orders binding upon fishers' associations and upon all persons fishing under the authority of the State of Washington.

We have noted that the appellants argue that the district court's actions violate equal protection. The allocation is not an allocation among an indistinguishable mass of citizens but between two groups of persons each claiming undivided half-interests in a quasi-cotenancy. Each of the co-owners, the state and the tribes, is a quasi-sovereign, and the distinction between their members is thus political rather than racial.

Ethnic origin is relevant only to the degree it happens to define tribal, and therefore political, status. An ethnic Indian who is not a member of a tribe with reserved fishing rights is in the same position with respect to Washington fish and game laws as any other citizen of the state.

We find no abuse of discretion in the district court's orders allocating the opportunity to take fish. The circumstances compelled the court to intervene in fisheries management, and the state does not appear to quarrel seriously with the specific allocations.[8] Indeed, we do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner. The numbers question is one of degree, not one of principle. Fish reach the tribal fishery after passing through the areas of heaviest nontribal fishing. The technology of commercial salmon fishing favors the nontribal fisher. If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share, particularly in light of the need to provide an escapement of fish sufficient to preserve the run. Preserving the tribal opportunity requires limiting the nontribal opportunity.[9] In restating this obvious truth, we are not unmindful of the equities that lie on the side of the State of Washington. Its hatcheries help produce fish that will be caught by Indians as well as by non-Indians. But these equities call for state, federal, and tribal cooperation. They do not justify an attitude of total intransigence.

IV Gray's Harbor

Because of uncertainty over whether the Quinault tribe would continue as a plaintiff in the earlier litigation, the original pretrial order defined the case area to include only coastal streams north of the Gray's Harbor watershed. This area includes the Quinault reservation and several

off-reservation streams which are usual and accustomed locations for Quinault fishers. There was evidence at the trial concerning Quinault fishing in Gray's Harbor as well as within the case area. The court found that Quinault Indians had important fisheries, shared with other tribes, in Gray's Harbor and its tributaries, although it did not specifically find them to be usual and accustomed fishing places. 384 F. Supp. at 374-75. In 1974, in response to a motion by the state, the court held that the Quinault tribe had usual and accustomed fishing places in the Gray's Harbor area and that nothing in its previous decisions prevented them from using those places. The state filed a notice of appeal from this ruling, but the appeal apparently lapsed for want of prosecution.

Since the district court's original decision the Quinault tribe has been actively developing its Gray's Harbor fishery, both by increasing its fishing capacity and by manging the run to produce more fish. The state's actions in response to the state court decisions threatened the continuance of this Indian fishery, and the district court's order and injunction of August 10, 1977, as interpreted on August 12, excluded Gray's Harbor fishing from its protection. In response to this situation, the Quinault tribe, with the support of the United States, asked the district court to extend the case area to cover Gray's Harbor. The court agreed to the request. After a series of hearings the court allocated the opportunity to take fish between the treaty and nontreaty fishers in a fashion similar to its other allocations.

One question on appeal is whether the district court had the authority to expand the case area beyond that defined in the pretrial order and in its original decree; Gray's Harbor was included in the original complaint. The United States argues that the district court simply extended its decree, without modification, to cover a new area. We cannot agree with this statement. In its conclusion of law number 7, 384 F. Supp. at 400, the court explicitly excluded Gray's Harbor from the case area. To change the case area requires

changing this conclusion of law. Since the decree depends on the conclusions of law, such a change would be a modification of the decree.

The state suggests that the tribe's request may be a motion to modify the decree under Fed. R. Civ. P. 60(b). Rule 60(b), however, deals with relief from judgments, not modification at the prevailing party's request to extend the judgment's scope.

The best interpretation of the district court's order is that it is a supplemental decree based on a modification of the pretrial order to conform to the evidence presented at the trial. Under Fed. R. Civ. P. 15(b), the pleadings may be amended, even after judgment to conform to the evidence. The same standard should be applied to the modification of a pretrial order under Rule 16 in these circumstances. 3 Moore's Federal Practice ¶ 15.13[1]. We have previously upheld a district judge who applied Rule 15(b) standards to amend a pretrial order to conform to the proof, Gsell v. Adams, 316 F. Supp. 394 (D. Or. 1969), aff'd, 431 F.2d 1204 (9th Cir. 1970), and one whose holding was based on a theory which had evidentiary support and was argued but which was not in the pleadings or the pretrial order, Dering v. Williams, 378 F.2d 417 (9th Cir. 1967).[10] Here the parties tried the issue of Quinault off-reservation fishing without objection. The trial court found that Quinault Indians traditionally used Gray's Harbor and its watershed for their fishing; its failure to use the treaty words "usual and accustomed fishing places" was the result of the exclusion of Gray's Harbor from the case area of the original decree. When the state asked the court to limit Quinault fishing in Gray's Harbor, the court specifically found that the Quinault tribe had usual and accustomed locations there; the state failed to pursue its appeal from this finding.[11]

In the light of these circumstances, we will treat the court's order expanding the case area as a supplemental decree based on an implied modification of the pretrial order to conform it to the

evidence actually presented.[12] (The court retained continuing jurisdiction to enter further decrees.) As a supplemental decree, the order is appropriate. Some action was necessary to protect Quinault treaty rights in Gray's Harbor. The alternative to the supplemental decree would have been to bring a separate action, which the court would undoubtedly have consolidated with this action. The evidence and parties were such that the state would probably have been collaterally estopped to deny most of the necessary facts; the court could certainly have issued a temporary restraining order or preliminary injunction with little extra delay. The court did hold factual hearings before making its allocations of fishing opportunity. The only result of requiring a separate action would have been to add further complexity to an already complex case.[13]

V Binding Nonparties

Several of the district court's orders were directed to individual fishers and to fishers' assocations, although these persons and associations were not parties to the litigation. The fishers argue that the court was therefore without jurisdiction over them. The United States suggests several theories which would support the district court's actions. Without ruling on the other theories, we agree that the fishers are bound because they are in privity with the state, which is a party. Wild animals and fish belong to the people of a state as a whole in their sovereign capacity, and the state may regulate the manner of their taking or prohibit it entirely. Geer v. Connecticut, 161 U.S. 519, 527-30 (1896).[14]

Both Oregon and Washington hold that fish within their borders, so far as title can be asserted, belong to the state in its sovereign capacity in trust for its people. Anthony v. Veatch, 189 Or. 462, 474-75, 486-87, 220 P.2d 493, 498-99, 503-04, rehearing denied, 189 Or. 504, 221 P.2d 575 (1950); Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 661,

87 P.2d 195, 198 (1939); Monroe v. Withycombe, 84 Or. 328, 334-35, 165 P. 227, 229 (1917); Washington Kelpers Association v. State, 81 Wash. 2d 410, 414-15, 502 P.2d 1170, 1172-73 (1972), cert. denied, 411 U.S. 982 (1973); State ex rel. Bachich v. Huse, 187 Wash. 75, 79-80, 59 P.2d 1101, 1103-04 (1936). The Washington Supreme Court has recently specifically held that fishers have no private property rights in taking salmon. "In regulating the fisheries, the state is merely enacting legislation concerning its own property and prescribing the methods which may be used in acquiring it by private persons." Washington Kelpers Association v. State, 81 Wash. at 415, 502 P.2d at 1173. While the quoted statement of state ownership may be too strong, it shows that under Washington law the citizen's right to take fish is purely derivative of the state's power to regulate rights in the fish. The fishers' interest is therefore derivative of the state's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-41 (1958); Wyoming v. Colorado, 286 U.S. 494, 506-09 (1932).[15] This being the case, the district court had authority to act against the fishers directly when it appeared that the state was unable to do so. Since the fishers are bound by the district court's actions, they may not collaterally attack them now, and they are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them.[16] Any complaints the fishers may have concerning the state's representation of their interests are matters between them and the state. Indeed, much of the difficulty in this case is the direct result of the pressure these same fishers have brought to bear upon the state government.

The district court's injunction against state court action was both necessary and proper. The state trial court sought to require the Department of Fisheries to authorize a harvest of fish without regard to tribal rights or the district

court's orders. This action went beyond the Washington Supreme Court's holding that the Department was without authority to obey the district court's orders; instead, it required a direct violation of them. The normal requirements for injunctive relief were clearly present. Washington's reliance on 28 U.S.C. § 2283, which limits injunctions of state court proceedings, is misplaced. Section 2283 does not apply when the United States requests the injunction. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 224-26 (1957). Nor should the district court have waited for the state system to resolve questions of state law; none were relevant. As a party to this action, the state was bound not to interfere with the district court's enforcement of its decree, and any state law to the contrary would fall under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

VI Columbia River

A few issues concerning the Columbia River case deserve comment. The agreement reached by all the parties in early 1977 is a decree of the District Court of Oregon. No party has raised any questions in the district court concerning the State of Washington's authority to enter into the agreement and consent to the decree; the state is therefore bound by it. Under the principles discussed above, the fishers from both sides of the river, Oregon and Washington, are bound by the decree binding the states, and the district court had authority to hold violators with actual knowledge in contempt.

The district court's jurisdiction extends to the entire Columbia River, not simply to the Oregon side. Oregon Admission Act of February 14, 1859, § 1, 11 Stat. 383; The Annie M. Smull, 1 Fed. Cas. 983 (No. 423) (D. Or. 1872). Nielsen v. Oregon, 212 U.S. 315 (1909), simply holds that Oregon may not enforce its regulatory laws on the Washington side. It does not question the power of the district court to enforce federal law over the entire river.

VII Conclusion

We do not entertain the illusion that this is the last appeal we will see in this case. The issues involved are too volatile and raise too many emotions for a mere statement of the law to resolve them. On the other hand, neither this court nor the district court has any desire to be a permanent fish master in Washington waters. It is to be hoped that the parties can reach an agreement, as they did in the Oregon case, and that Washington law will be changed to allow the state to carry it out. Until the state decides to cooperate, the district court will have to continue protecting the tribes' rights. The state and the fishers hold the key to lifting federal judicial interference with their fish-management prerogatives.

In Nos. 77-3208 and 77-3129, the applications for writs of mandamus are dismissed.

In Nos. 77-3209, 77-3654, and 77-3655, the judgments are affirmed.

The cases are remanded so that the district courts may retain continuing jurisdiction.

FOOTNOTES:

[1]This reservation included customary uses outside the area ceded. See Seufert Brothers Co. v. United States, 249 U.S. 194 (1919).

---

[2]It is questionable whether Anglo-American concepts of sovereignty existed in these Indian cultures, or whether the collections of villages Governor Stephens made for purposes of his negotiations were in fact tribes. The United States treated them as tribes, however. The villages were then exercising and the tribes have since exercised what we would consider sovereign powers over their members and territories. These concepts have become basic to the legal justification for preserving the tribes as legal and cultural entities, a goal which the treaties were intended to serve and which Congress has recently reaffirmed. Indian Self-Determination Act of 1975, Pub. L. 93-638, Title I, 88 Stat. 2203, 2206. We will therefore use these concepts, recognizing that in doing so we may not be perfectly adapting Western legal concepts to Indian culture.

---

[3]We refer to the cotenancy analogy only because it is helpful in explaining the rights of the parties, not because all the rights and incidents of a common law cotenancy necessarily follow. The shared interest is in a yearly run which is apportioned on a yearly basis between two parties, each having equal rights in it. It is this equality of right between two quasi-sovereigns which we

expressed by analogy in the earlier case. Obviously, not all the rules of cotenancy in land can apply to an interest of the nature of a profit. Another analogy might have been drawn to the doctrine of equitable apportionment between states claiming the yearly flow of a common stream. The Supreme Court has often resolved the conflicting claims of quasi-sovereign states in this context. Nebraska v. Wyoming, 325 U.S. 589 (1945); Wyoming v. Colorado, 259 U.S. 419 (1922). Similar principles might apply here with the addition, of course, of the equality of rights which the treaties guarantee. The primary point is that the state and the tribes stand in similar positions as holders of quasi-sovereign rights in the fishery, and that the federal courts are, when necessary, the arbiters of those rights.

---

[4]Judge Burns pointed out this recalcitrance in his concurrence in United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

---

[5]In those cases, and in Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977), the court construed the treaties as simply guaranteeing tribal Indians equal treatment with other citizens and stated that the district court's actions had created a class based on an impermissible racial classification. We reject these positions for the reasons given above and in Justices Horowitz' and Utter's dissents. We assume that the Washington court has unwittingly misconstrued the basic concepts of Indian law and failed to understand a long line of Supreme Court decisions beginning with United States v. Winans, 198 U.S. 371 (1905).

This misconstruction of Indian law was one basis for the Washington court's denial of state authority to allocate fish between treaty and nontreaty fishers. The state court thought that such an allocation would violate equal protection, something the state could not be required to do. We question whether the court would continue to deny state agencies the authority to allocate under a correct view of tribal status and rights.

---

[6]The appellants argue that the district court attempted to transfer title in the fish to the tribes although fish in their wild state are incapable of being owned. This was not the district court's order. Considered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish taken.

---

[7]There is a small tribal ocean fishery, and the parties do not agree whether it is included in the tribal share. If it is not now included, we presume the district court would include it on a proper showing.

---

[8]The appellants do question the district court's limitation only of commercial fishing. Such a limitation may be the most practical way to enforce the district court's orders. The state can always propose limitations effective against both sport and commercial fishers if it can give reasonable assurances that such limitations would be enforceable. If the state were able and willing to regulate its fishery in a way consistent with the

district court's orders, of course, the sport/commercial fishery issue would be entirely a state concern so long as tribal fishers had an opportunity to take their treaty shares.

---

[9]Appellants urge that the treaties are not self-executing but require Congressional action to be effective. The treaties specifically reserved rights to the tribes and gave federal guarantees of those rights; we do not know what more would be necessary to make the treaties effective and enforceable in federal court as the supreme law of the land. See United States v. Washington, 520 F.2d at 684.

---

[10]Other circuits have reached similar conclusions. In Monod v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969), the court in dictum stated that Rule 15(b) standards apply to a postjudgment amendment of a pretrial order if the issue has been tried without objection. The Sixth Circuit agrees, if the parties understood that the evidence was directed to the unpleaded issue. MBI Motor Company, Inc. v. Lotus/East, Inc., 506 F.2d 709 (6th Cir. 1974). The Fifth Circuit points out that in these circumstance allowing the amendment is mandatory. Wallin v. Fuller, 476 F.2d 1204 (5th Cir. 1973).

---

[11]The fact that Gray's Harbor is outside the area ceded is irrelevant if Quinault Indians customarily fished there. Seufert Brothers Company v. United States, 249 U.S. 194 (1919).

---

[12]No one suggests a need for the trial court to go back and amend the pretrial order if we can say on appeal that it would have been justified in doing so. Dering v. Williams, 378 F.2d 417 (9th Cir. 1967). An appellate court may uphold a judgment on any theory which finds support on the record even though the lower court relied upon a wrong ground or gave a wrong reason. Jurinko v. Edwin L. Wiegand Company, 477 F.2d 1038 (3d Cir.), vacated on other grounds, 414 U.S. 970 (1973).

---

[13]The state's only objection to the specific allocations seems to be based on the equal protection argument which we rejected above. We thus have no occasion to decide whether the allocations were within the district court's discretion.

---

[14]Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284-85 (1977), simply holds that a state does not have title to its fish to the extent that it can give its citizens rights superior to those of citizens of other states who hold a federal fishing license. This holding does not deny the state's substantial interest in fish or that its claim to them, as a sovereign, represents the claim of all its citizens. See Justice Rehnquist's opinion in Douglas, 431 U.S. at 187-88.

---

[15]The United States and the tribes cite Wyoming v. Colorado and several other water law cases in their brief. We agree with them that this is the most nearly analogous area of the law. States litigate their quasi-sovereign rights to water, and appropriators under the states' laws are bound by those decisions without being parties.

Nebraska v. Wyoming, 295 U.S. 40, 43 (1935). Washington's fishers are its privies in litigation over the state's quasi-sovereign right to its fish in the same way that Wyoming's appropriators are its privies in litigation over the state's quasi-sovereign right to water.

---

[16]The appellants make a number of technical attacks on the injunctions. We find them to be without merit. In the context of all the proceedings in this case, the state and the fishers knew what was being enjoined. The use of a telephone hot line for daily information on fisheries openings and closings was appropriate and may have been the only practical way to get the information to all the fishers affected by the court's orders.

RE: PUGET SOUND GILLNETTERS ASSN. v. USDC, W.D. WASHINGTON, et al., No. 77-3129

COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION v. USDC, D. ORE., et al., Nos. 77-3208/3209

UNITED STATES v. WASHINGTON, Nos. 77-3654/3655

KENNEDY, Circuit Judge, Concurring:

The dimensions of the state's resistance to the decrees in these cases are, in my view, overstated by the opinion for the court, but I fully agree that by its policy with respect to this litigation the state has unduly complicated the issues without advancing its own cause. I agree further that an apportionment of fishing rights half to the treaty Indians and half to all other fishermen is binding on this panel. United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). However, the court undertakes to restate the rationale for the apportionment rule of our earlier decision, and I find it necessary to suggest that the explanation of this critical point remains somewhat obscure.

The prior decision of this court and the opinion for the court on this appeal rely on an analogy to a cotenancy or to a "quasi-cotenancy" to rationalize the rule of even apportionment. The principles of a cotenancy apply to the legal relation among parties who share a right of possession in real or personal property.[1] But the parties to this dispute claim rights of access and exploitation in a wildlife resource of fluctuating and uncertain extent. These rights do not depend upon possession, or even upon ownership, of the wildlife itself. The cotenancy analogy would be of dubious relevance even in an era when the supply of fish exceeded the demands of the fishing population.[2] Certainly it is inadequate to resolve the present conflict between treaty rights and asserted state authority to conserve and allocate a fishery that cannot sustain the full demands of all the

parties to this litigation. A cotenant, absent acts of waste or ouster, has the right to possess and use the entire property.[3] Accordingly, serious application of the analogy might permit a fishing group to take all the fish it has the capacity to catch, a result contrary to the one we affirmed in the principal case.[4]

Most importantly, the concept of a cotenancy does not help the court determine what share of the disputed rights should be allocated to each of the parties. By relying so heavily upon the theory, the court seems to imply that an even apportionment follows from creation of a cotenancy; but, of course, it does not. Cotenancy is not synonymous with entitlement to equal shares.[5] Nor does the right of a cotenant to partition provide guidance for an equitable division of the fish. Effective use of that remedy presupposes a method of determining the percentage interests of the parties, but that is precisely the question to be answered in the case.

By using the cotenancy theory to explain the critical ruling on apportionment, the court tends to mask the most difficult problems of this litigation: definition of the rights recognized by the treaties, reconciliation of those rights with the state's legitimate interest in conservation,[6] and declaration of the parameters of the state's authority to protect its interest by appropriate regulation. These are the issues that must be resolved if the district court is ever to return the task of supervising the fishery to the state.

Indian treaties are not second-class agreements, and rights declared by them may not be whittled down year by year as the state asserts a need to exercise its regulatory authority. The state, and, absent its cooperation, the federal courts, must protect the fishing resource in a manner that respects the rights of the treaty parties. The boundaries of the state's authority and any rule of apportionment must therefore be drawn with precise reference to the treaty understandings. The district court undertook to explain

those understandings in its original decision, and proper review of its ruling requires a like analysis. No doubt it would be correct to determine that the Indian tribes retained by treaty the right to fish for subsistence and ceremonial purposes and the right to a fair opportunity to compete in the recreational and commercial fisheries. But it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights.

I recognize that the opinion of the court does not advocate strict adherence to the technical rules of common law cotenancy as a means of resolving this case. The defects of the analogy, however, should be noted specifically, since alternative justifications for the apportionment rule have not yet been fully discussed. This panel is bound by United States v. Washington, supra, and thus I concur in today's judgment. However, I would not attempt to restate or explain that decision by means of an inappropriate analogy. We do not sustain the dignity of the treaties in question by deriving an apportionment rule from a hesitant reference to property concepts that are unrelated to the rights asserted by the parties.

/s/
United States Circuit Judge

FOOTNOTES

Footnote 1 (reference page 1)

"For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession." 2 W. Blackstone, Commentaries *180.

Footnote 2 (reference page 1)

The term "tenants in common" was used in an early case to describe the rights of state citizens to the ownership of New Jersey oyster beds. Corfield v. Coryell, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823). The phrase, however, was used solely to explain the court's holding that state citizens collectively held one hundred percent of the rights to the shellfish to the exclusion of noncitizens, rather than as a point of departure for explaining a method of division.

Footnote 3 (reference page 2)

2 American Law of Property § 6.13, at 52-53 (A. J. Casner ed. 1952); R. Powell & P. Rohan, Powell on Real Property ¶ 603 (1 vol. ed. 1968); H. Tiffany, The Law of Real Property § 199 (3d ed. 1970).

At common law, property rules pertaining to ouster and waste insured that cotenants share finite resource fairly, but to apply those rules to effect an allocation of the parties' rights here would stretch an already attenuated analogy to the breaking point. Moreover, there is substantial doubt that the apportionment theory of this case follows from those rules.

The standards which define waste for which a life tenant or tenant for years may recover are not necessarily applicable as between cotenants. The English rule is that, since a cotenant of a fee simple estate has the right to enjoy and use the common property in any reasonable way, the usual

and ordinary use of the property by an owner in severalty is not waste. 2 American Law of Property, supra, § 6.15, at 64; 2 W. Walsh, Commentaries on the Law of Real Property § 131, at 69 (1947). Thus, any cotenant may cut trees that are mature and fit for cutting, Martyn v. Knowllys, 101 Eng. Rep. 1313 (K.B. 1799), and may develop and operate mining land, Job v. Potton, 20 Eq. 84 (1875), without liability for waste. In the United States, while it is clear that acts which amount to destructive permanent damage to the common property are held to constitute waste, E. Hopkins, Handbook on the Law of Real Property § 214, at 342 (1896); 2 W. Walsh, supra, § 131, at 72, some cases have follow the English rule allowing the cutting and sale of timber, Hihn v. Peck, 18 Cal. 641 (1861); Buchanan v. Jencks, 38 R.I. 443, 96 A. 307 (1916); Williams v. Bruton, 133 S.C. 395, 131 S.E. 18 (1925); McDodrill v. Pardee & Curtin Lumber Co., 40 W.Va. 564, 21 S.E. 878 (1895), and the operation of mines, quarries, and oil wells, Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924); Cascaden v. Dunbar, 191 F.471 (9th Cir. 1911); McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 27 P. 863 (1883); Payne v. Callahan, 37 Cal. App. 2d 503, 99 P.2d 1051 (1940), while others have held that the cutting and sale of timber, Fitzhugh v. Norwood, 153 Ark. 412, 241 S.W. 8 (1922); Emmons v. Evans, 178 Ky. 180, 198 S.W. 900 (1917), or the development or operation of mines or oil wells, Clark v. Whitfield, 218 Ala. 593, 119 So. 631 (1929); Abbey v. Wheeler, 170 N.Y. 122, 62 N.E. 1074 (1902); McNeely v. South Penn Oil Co., 58 W.Va. 438, 52 S.E. 480 (1905), constitutes waste. In cases following the later rule, courts have tended to call the action one for waste but to hold the defendant merely to a duty to account for the net proceeds from the operations rather than to impose the usual penalties, such as trebel damages, for waste. See generally cases cited above and 2 American Law of Property, supra § 6.15; 2 W. Walsh, supra § 131.

Injunctive relief in an action for waste by one cotenant against another is granted only for waste which is "of a malicious character, or so unusual or unreasonable as to constitute a wanton destruction of the estate." Mott v. Underwood, 148 N.Y. 463, 42 N.E. 1048, 1050 (1896); see McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 27 P. 863 (1883); R. Powell & P. Rohan, supra, ¶ 647, at 695.

With reference to ouster, a tenant who excludes his cotenants from the commonly held property by adverse possession is guilty of an ouster, and an action in ejectment may be brought by a dispossessed tenant. J. Cribbet, Principles of the Law of Property 104 (2d ed. 1975). "[T]he ousting tenant's possession must be exclusive, for mere possession and use of the entire property by one cotenant is not an ouster, nor is his possession adverse, so long as the other cotenants remain voluntarily out of possession, and are not kept out of possession by the acts of the possessor-tenant." 2 American Law of Property, supra § 6.13, at 52-54 (footnotes omitted).

Footnote 4 (reference page 2)

While courts will not interfere by way of injunction with cotenants' exercise of their rights to use and enjoyment of the cotenancy even when one cotenant has committed waste, see note 3 supra, an action for an accounting for rents and profits between cotenants may be available when one cotenant has taken certain advantages from the property. Even when a cotenant's use does not constitute waste or ouster, he is required to account to his cotenants for their proportionate share of the net amount received from the cutting and selling of timber or the operation of mines or oil wells. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924) (oil); Cascaden v. Dunbar, 191 F. 471 (9th Cir. 1911) (gold mining); Buchanan v. Jencks,

38 R.I. 443, 96 A. 307 (1916) (timber); see Martyn v. Knowllys, 101 Eng. Rep. 1313 (K.B. 1799). However, a cotenant is not required to account for crops grown and harvested by him. 2 American Law of Property, supra note 3, § 6.14, at 60; see, e.g., Black v. Black, 91 Cal. App. 2d 328, 204 P.2d 950 (1949); Le Barron v. Babcock, 122 N.Y. 153, 25 N.E. 253 (1890). The distinction seems to be that a cotenant need not account for profits from a use of the cotenancy which does not reduce the permanent value of the property. Cf. 3 B. Witkin, Summary of California Law § 216, at 1948, (8th ed. 1973), suggesting that because of the possibility of exhausting the resources, the rule of accounting is a special rule applying only to oil and mineral rights. In Mott v. Underwood, 148 N.Y. 463, 42 N.E. 1048 (1896), the court assumed that a cotenant who planted oysters in a commonly held oyster bed could prevent his cotenants from interfering with the crop, though no cotenant could maintain an action for trespass or conversion against his cotenant for taking natural oysters from the land held in common. That case suggests that oysters, at least, might be treated in a manner similar to crops for purposes of an accounting. To the extent that a run of anadromous fish is capable of self-perpetuation, that is, up to the point where fishing activity reduces the quantity of fish in future runs, perhaps each cotenant should be allowed to take free from a duty to account.

Another factor in the equitable equation is that the State of Washington operates salmon hatcheries. In an acction for an accounting, a cotenant who makes improvements on the property generally may not claim a credit for such expenditures. 2 American Law of Property, supra note 3, § 6.18, at 81. In an action for partition, however, a cotenant who has made an improvement is awarded any additional amount which the property might bring as a result of the improvement. 2 American Law of Property, supra note 3, § 6.18, at 83; IV S. Symons, Pomeroy's Equity Jurisprudence § 1389, at

1018 (5th ed. 1941). Apparently neither the district court nor this court has considered whether the state's operation of hatcheries should have an effect on apportionment of the fish. Cf. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II) (reserving the question of whether the catch of steelhead that was developed from the state hatchery program could be taken into consideration in allocating the yearly catch between treaty Indians and sport fishermen).

Again, the cotenancy analogy, if taken seriously with reference to the rule of even apportionment, creates more problems than it solves.

Footnote 5 (reference page 2)

Each tenant in common may have a share greater or smaller than the shares of the others. 2 American Law of Property, supra note 3, § 6.5, at 19. If the shares are not fixed in the instrument creating the cotenancy it may be presumed that the cotenants take in equal shares, but an intent that they hold different fractional shares may be established by the circumstances. Id. at 19-20; E. Hopkins, supra note 3, § 209, at 336.

Footnote 6 (reference page 2)

See Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968) (Puyallup I).

Puget Sound Gillnetters Association
v. USDC - No. 77-3129

Columbia River Fishermen's Protective
Union v. USDC - Nos. 77-3208-3209

United States v. State of Washington
Nos. 77-3654/3655

WALLACE, Circuit Judge, Concurring:

While I sympathectically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs STATE OF WASHINGTON, et al., Defendants.	) CIVIL NO. 9213))PRELIMINARY IN-)JUNCTION RE:)ENFORCEMENT OF)LIMITATIONS ON)NONTREATY SAL-)MON FISHERIES)FOR 1978 AND)SUBSEQUENT)SEASONS

Upon the motion of the United States, together with the exhibits, the testimony of witnesses and the records and files of this case, the court finds that the State of Washington and its officers and agencies remain unwilling or unable to carry out the existing orders of this court and to prevent certain nontreaty fishermen from taking, under color of state law and in some cases in defiance thereof, salmon which under the orders of this court are to be left available for harvest by the plaintiff tribes and their members under reserved rights expressly secured by federal law.

The court further finds that this situation, if permitted to continue, will frustrate the decrees of this court, irreparably harm the plaintiff tribes and their members by substantially depriving them of their rights to harvest such salmon, imperil the perpetuation of the salmon resource and lead to a breakdown of law and order, and that to prevent such continuance, only direct action of this court, including the issuance of and enforcement of an injunction against certain nonparties, is required in the form and manner hereinafter set forth.

The court also finds that adequate public and/or personal notice of the hearing on the government's motion for an injunction on this matter and an opportunity to be heard prior to the entry of any injunction was given to affected nonparties. The court finds that service of the notice and invitation to be heard was made by the United States Marshal's Service on some 2,445 persons who were State-licensed commercial net salmon fishermen for 1977, out of a total of 2,700. The court has considered all relevant points and authorities presented by such nonparties.

Therefore, it is hereby ORDERED THAT:

1. Fishing in the waters of Puget Sound and other marine waters easterly of the Bonilla Point-Tatoosh Line (located at the western end of the Strait of Juan de Fuca) and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor and its watersheds is subject to the provisions of this order.

2. All gillnet, purse seine and reefnet fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in any portion of the waters described in paragraph 1, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, Grays Harbor Gillnetters Association, and all persons in active concert or participation with them, are hereby enjoined and prohibited from taking, attempting to take, or offering for sale, salmon of any species taken from such waters, or assisting in any of the foregoing, unless such person has, within the previous twenty-four hours, ascertained from the National Marine Fisheries Service telephone "hot-line" (toll free number: 1-800-562-5672) that such fishing in the area in which the individual intend to fish is not prohibited by this court at the time of such fishing, provided that this paragraph shall not apply to treaty Indians fishing pursuant to tribal regulations promulgated in accordance with the orders of this court. The National Marine Fisheries Service shall announce all lawful openings of nontreaty

fishing and all lawful conservation closures on its "hot-line" and shall maintain a written copy of all announcements for a period of at least 60 days beyond the end of the calendar year in which the announcement was made.

3. All fishermen described in paragraph 2 are hereby prohibited from possessing salmon of a particular species in any area in which at that time fishing for that species by such person is prohibited by paragraph 2 of this order; provided that this paragraph shall not prohibit fishermen from transporting salmon caught in an open area through a closed area for the purpose of selling the catch.

4. Personnel of the National Marine Fisheries Service, the Coast Guard, the United States Marshal's Service and the Washington Department of Fisheries and persons lawfully deputized by any such agency may board fishing vessels for the purpose of investigating suspected violations of this injunction.

5. At the direction of any enforcement agent described in paragraph 4, all persons described in paragraph 2 are hereby ordered to stop their vessels, permit boarding by enforcement agents, permit themselves and their vessels to be photographed, permit their catch to be examined, identify themselves and their vessels to the satisfaction of the boarding enforcement agents, and produce either a valid Washington Department of Fisheries net salmon fishing license or a valid treaty Indian identification card for the then-current fishing season which, by this order, all fishermen are required to carry when engaged in any salmon fishing activity described in paragraph 2. Any fisherman failing to identify himself as provided herein may be placed under arrest and shall be taken before a United States Magistrate for proceedings pursuant to Rule 5 of the Federal Rules of Criminal Procedure.

6. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal's Service, and such other

agencies as may be appropriate, may serve copies of this injunction and other relevant orders or process on fishermen described in paragraph 2. All Officers and Petty Officers of the United States Coast Guard and the National Marine Fisheries Service assigned by their respective superiors to carry out the provisions of this order are hereby appointed as process servers and agents of the court within the meaning of Title 18, United States Code, Sections 1501 and 1509. The orders, citations and papers required to be served by enforcement agents under this order are found to be judicial writs and process of this court within the meaning of Title 18, United States Code, Sections 1501 and 1509.

7. The State of Washington and the United States are ordered to maintain reasonable surveillance of the fishing areas affected by this order and to cite any fishermen who, having had notice of this injunction, thereafter continues or engages in any act prohibited by paragraphs 2 or 3 of this injunction or fails to do any act required by paragraph 5, to appear before the United States District Court to be ordered to show cause why he should not be held in contempt.

8. Nothing in this order shall relieve the defendant State of Washington or its agencies, officers and employees of any obligation under prior orders of this court including, but not limited to, the obligation under paragraph 8 of the Injunction of March 22, 1974 (384 F. Supp. at 415-16), to diligently and vigorously enforce, as far as circumstances permit, their applicable statutes and regulations in order to safeguard the fish resources from depletion or destruction due to unlawful fishing by persons subject to the state's jurisdiction.

9. The issuance of this injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members and to the salmon resource for which there is no adequate remedy at law.

10. The issuance of this injunction is necessary in aid of this court's jurisdiction and to protect or effectuate this court's judgments.

This injunction shall remain in effect until further order of this court.

IT IS HEREBY SO ORDERED this 6th day of June, 1978.

/s/
George H. Boldt
SR. UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs STATE OF WASHINGTON, et al., Defendants.	No. 9213 FINDINGS OF FACT

---

1. The treaty fishing rights of the plaintiff tribes have been previously determined by this Court.

2. Since 1974 there has been increasing difficulty in enforcing treaty fishing rights. Denial of treaty fishing opportunity will result in injury to economic, cultural and governmental interests of the plaintiff tribes.

3. If the lack of enforcement of treaty Indian fishing rights by the State of Washington continues, there will be irreparable harm to the plaintiffs' rights assured them under the decision of this court.

4. The evidence has established that there have been numerous instances of violations of State regulations designed to allocate additional fish to treaty Indians, but there has been a lack of enforcement against these violators, either due to State court decisions or the enforcement policies set by the Washington State Department of Fisheries.

5. The State of Washington has indicated through its court decisions, and through its executive policy, that the Director of the Department of Fisheries is not empowered to promulgate the regulations allocating additional fishing opportunity to treaty Indians as required by the decision of this court.

6. The Washington Department of Fisheries did not assist in issuing citations or serving the enforcement injunction during 1977.

7. An emergency exists because of the State of Washington's continuing inability and unwillingness to assume its regulatory and enforcement responsibilities under Final Decision 1. This mandates the creation of a federally-led enforcement group, which needs time to develop a comprehensive enforcement plan for the upcoming season.

8. Alternatives to direct injunction of non-treaty fishermen which have been used by this Court in previous years to obtain compliance with its orders have not sufficiently deterred violations of those orders, nor provided adequate additional fishing opportunities to treaty tribes.

9. Although the Court may speculate that if no injunction were issued, there might be less havoc in the fishery, that is not the test. The test is whether or not treaty fishing rights can be effectuated without the entry of the injunction. No alternative plan which contemplates enforcement of treaty fishing rights has been presented.

10. The Court has the authority to enjoin the fishermen who are non-parties in this case. Rule 65(d) of the Federal Rules of Civil Procedure does not enumerate the only non-parties who may be enjoined. See also, Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington, __ F.2d ___, No. 773129 (9th Cir. Apr. 24, 1978).

11. Notice of this hearing has been given to approximately 2,455 of the 2,700 commercial net fishermen directly affected by the proposed injunction. Additionally, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association and the Grays Harbor Gillnetters Association have been given notice. Several of these non-parties have appeared and have been given the opportunity to address the Court and to present evidence. The fact that they are not parties to this lawsuit has placed restrictions on the scope of their participation.

12. None of the non-party associations or persons asked for intervention in connection with this proceeding. Under the reference to the Magistrate, there was no power for him to grant the status of "party" to a non-party.

13. Although both the United States and the plaintiff tribes offered to make witnesses available to the non-party participants, none took advantage of this offer.

14. Although the implementation of the treaty rights as determined in Final Decision 1 necessarily diminishes the opportunity of the non-treaty fishermen to harvest fish, that fact is not controlling.

15. Until a better solution arrives through agreement by the parties, congressional action, or the willingness of the State of Washington and its courts to assume the State's management and enforcement responsibilities as directed by Final Decision 1, this Court, in its continuing jurisdiction over the resource, must provide for protection of treaty fishing rights.

16. It is appropriate to limit those circumstances under which enforcement officers may board fishing vessels for purposes of investigating violations of the injunction to those situations where they have probable cause to believe that a violation has occurred.

17. The nature of the fishery is such that an effective management and enforcement system must provide the ability to open and close the fishery on short notice.

18. The enforcement injunction presented by the Government provides a reasonable means by which to notify the fishermen of lawful openings and closings.

19. A toll-free telephone "hotline" has been used to announce fishing regulations in the State of Washington for several years.

20. Statements of several of the fishermen who appeared before this Court indicate that widespread resistance to recognizing treaty fishing rights still exists.

21. Voluntary reductions in non-Indian fishing are unlikely. An individual fisherman wishing to make a good faith effort to comply with Final Decision 1 cannot do so unless some government tells him when he may fish without infringing on treaty rights. The State of Washington will not do this.

22. Because the non-treaty marine fishing fleet is much larger and more efficient than the treaty fleet, and because much Indian fishing occurs in the terminal areas, substantial curtailment of the marine fishing opportunity for non-treaty fishermen is necessary in order to permit treaty fishermen the opportunity to catch the share of the runs to which they are entitled.

23. During the 1976 and 1977 fishing seasons the Washington State Department of Fisheries developed a policy of not issuing citations to violators of allocation closures.

24. The Washington State Department of Fisheries has the power to regulate the fishermen it controls in such a way as to shift the burden of providing treaty Indian fishing rights away from the net fishermen and spreading it to the hook-and-line fishermen by controlling their seasons, bag limits, gear type, and otherwise restricting hook-and-line fishing.

25. During the 1977 fishing season, there was a substantial amount of fishing during conservation closures. While most of this fishing was done by non-treaty fishermen, the State of Washington cited over 100 treaty Indians for fishing in violation of conservation closures as defined by the Washington Department of Fisheries.

26. During 1976, over 135,000 fish were taken in violation of State regulations,and during 1977, over 183,000 were taken by fishermen licensed by the State of Washington.

DATED this 6th day of June, 1978.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs,	)	No. 9213
v	)	CONCLUSIONS OF LAW
STATE OF WASHINGTON, et al., Defendants.	)	

1. In order to provide treaty Indians with the opportunity to catch 50% of the salmon returning to their usual and accustomed grounds, it is necessary to provide them with substantial exclusive fishing time.

2. Because of State Court interpretation of its regulatory authority, the Washington State Department of Fisheries will not promulgate regulations giving treaty Indians exclusive fishing time.

3. The failure to provide treaty Indians with substantial exclusive fishing time will cause them irreparable harm to their right to the opportunity to catch 50% of the salmon returning to their usual accustomed grounds.

4. The rights of the treaty and non-treaty fishermen have already been adjudicated, therefore economic disruption associated with implementing the 1974 decree is not legally cognizable. Weighing the relative legally cognizable hardships, the Court finds that the plaintiffs would be more damaged if this injunction were not entered than the defendants and non-party fishermen will be by its entry.

5. It is probable that the plaintiffs would succeed at a trial on the merits.

6. The public interest will be served by entry of this injunction in that United States

treaty obligations will be upheld, United States District Court orders will be enforced and a breakdown of law and order will be prevented.

7. Fixed pre-season regulations are impossible due to the nature of the fishery.

8. In order to insure that exclusive treaty Indian fishing time can be provided, there must be a means by which this Court can order non-treaty commercial fishermen not to fish during time when treaty Indians are fishing.

9. A mechanism for authoritatively informing the fishermen of lawful fishing times must be established before the fishing season.

10. The mechanism provided for in the Government's proposed order is reasonable.

11. An allocation of the fishing opportunity between treaty and non-treaty fishermen, and enforcement of that allocation is an appropriate exercise of this Court's discretion. Department of Game v. Puyallup Indian Tribe, 414 U.S. 44 (1973); Puyallup Indian Tribe v. Department of Game, 97 S.Ct. 2626 (1977); United States v. Washington, 520 F.2d 676 (9th Cir. 1975).

12. This Court has the authority and the duty to protect and effectuate its prior judgments. Brown v. Board of Education, 394 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Doe v. Ceci, 517 F.2d 1203 (7th Cir. 1975); United States v. Texas, 306 F. Supp. 469 (E.D. Texas 1972), aff'd, 495 F.2d 1250 (5th Cir. 1974); Bullock v. United States, 265 F.2d 683 (6th Cir.), cert. denied, 360 U.S. 909 (1959).

13. This Court has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when public interest and the rights of a large group of people are involved. Virginia Railroad Co. v. System Federation, 300 U.S. 515 (1937); Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168 (1973).

14. This Court is empowered to issue all writs necessary or appropriate in aid of its jurisdiction which are agreeable to the usages and principles of law. Title 28, United States Code, Section 1651.

15. This Court is empowered to punish disobedience or resistance of its lawful orders and decrees. Title 18, United States Code, Section 401.

16. In limited and extraordinary circumstances, this Court may enjoin individuals who are not formal parties to this action where they have notice of this Court's orders, they intentionally violate those orders, they are members of a class who cannot realistically be specified in advance of such violations, and their actions violate the rights of a large class of plaintiffs, interfere with the obligations and ability of defendants to comply with this Court's orders, create conditions of lawlessness and chaos in the community and interfere with this Court's ability to adjudicate the rights and responsibilities of the parties before it. Kasper v. Brittain, 245 F.2d 92 (6th Cir.), cert. denied, 355 U.S. 834 (1957); Bullock v. United States, supra; United States v. Hall, 472 F.2d 261 (5th Cir. 1972); N.L.R.B. v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942).

17. This Court may enjoin individuals who are not parties to the lawsuit when they are in privity with one of the parties; that is, when the party is representing the interests and advocating the position of the non-party. Puget Sound Gillnetters Association, et al. v. United States District Court, ___ F.2d ___, NO. 77-3129 (9th Cir., April 24, 1978); City of Tacoma v. Taxpayer of Tacoma, 357 U.S. 320, 340-1 (1957); New Jersey v. New York, 345 U.S. 369 (1953).

18. The orders of this Court directed toward the State of Washington are binding on its citizens. Such action is appropriate in this case because the litigation has adjudicated the right of the State of Washington to authorize the harvest of anadromous fish and the rights of all its citizens to harvest those fish. Arizona v. California, 373 U.S. 546 (1963); City of Tacoma v. Taxpayers of Tacoma, supra; Wyoming v. Colorado, 286 U.S. 494 (1932); New Jersey v. New York, supra; Kentucky v. Indiana, 28 U.S. 163 (1930).

19. The fact that the fishermen were not participants in the litigation leading up to Final Decision 1 does not prevent them from being bound by it. The State of Washington represented, and continues to represent, all of the non-treaty fishermen in this litigation. Puget Sound Gillnetters Ass'n, et al. v. United States District Court, ___ F.2d ___, No. 77-3129 (9th Cir., April 24, 1978).

20. This Court may enjoin interference with property which is under the control of this Court, and punish violations of such injunctions. Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950); In re Lustron Corp., 184 F.2d 789, 798 (7th Cir. 1950), cert. denied, 340 U.S. 946 (1951); 7 J. Moore Federal Pratice ¶ 65.12, n. 1 (1976); State v. Terry, 99 Wash. 1 (1917).

THEREFORE, IT IS ORDERED that the injunction shall issue.

DATED this 6th day of June, 1978.

/s/
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,	)	NO. 9213
Plaintiffs,	)	PRELIMINARY INJUNCTION
v	)	STAYING STATE COURT INJUNCTION AND ORDER
STATE OF WASHINGTON, et al.,	)	IMPLEMENTING PRELIMINARY
Defendants.	)	INJUNCTION

This matter having come on regularly before the Court on Plaintiffs' motion for a preliminary injunction staying state court injunction and for an order implementing the preliminary injunction, and the Court having considered the memoranda, oral argument of counsel and the record in this case, the Court makes the following Findings of Fact and Conclusions of Law and on the basis thereof, issues the following Orders:

FINDINGS OF FACT

1. In an effort to assure plaintiff tribes their federally guaranteed treaty fishing rights and at the same time avoid unnecessary conflict with the State judiciary, the United States, and the plaintiff tribes on July 28, 1977 asked this Court to specifically determine and allocate a portion of the harvestable fish between treaty and non-treaty fishermen for the 1977-78 season.

2. This request was prompted by the Washington Supreme Court's determination that the Department of Fisheries had no authority to make such an allocation under State law and the decisions of that Court that the Director must affirmatively authorize the harvest of all fish not needed for

propagation escapement and must do so on a basis that does not recognize treaty fishermen as a separate class whose distinct Federally secured rights are to be specifically protected. This Court thereupon issued a preliminary order on August 10, 1977 by which it assumed the responsibility for allocating the salmon runs between treaty and non-treaty fishermen, enjoined the State from authorizing or permitting harvest of the treaty fishermen's share, and directed the State to manage the remaining portion in a manner that would meet conservation needs and permit harvest of the remainder by non-treaty fishermen under State law and control. This Federal Court ordered allocation was necessary only because the State Supreme Court's interpretation of State law had prohibited State regulatory or management authorities from safeguarding or observing the treaty tribes' Federal rights. Puget Sound Gillnetters Association v. Moos, 88 Wash. 2d 677 (1977). Purse Seine Vessel Owners Association v. Moos, 88 Wash. 2d ___ (1977).

3. The August 10, 1977 order referred to above allocated a specific number of Puget Sound Chinook to treaty Indians for the 1977-78 season. This Court removed from the State of Washington authority, control and jurisdiction over the treaty allocation. The State enjoined from exercising any form of harvest management authorization over the fish so allocated.

4. The defendant Director of Fisheries promulgated regulations consistent with this Court's Orders but was then enjoined by the Superior Court for Thurston County from enforcing Emergency Orders 77-68, 77-70 and 77-73. Puget Sound Gillnetters Association v. Sandison, No. 58107. The Director had determined that his regulations were necessary to effectuate the management scheme ordered by this

Court. The Director of Fisheries was also ordered by the State Court to adopt harvest regulations based upon the total predicted number of salmon in the Puget Sound Area in such a manner as to eliminate the opportunity for treaty fishermen to harvest their treaty share and in total disregard of this Court's prior orders including Final Decision No. 1.

5. The very purpose of this Court's allocation order was to provide the treaty Indian fishermen the fishing opportunity required under treaties with the plaintiff tribes as interpreted by prior decisions of this Court.

6. The number of fish needed to insure proper spawning escapement remains within the jurisdiction of the State of Washington. Regulations adopted by the state (77-68, 77-70, 77-73) were necessary to insure that non-treaty fishing did not encroach upon fish needed to perpetuate the run.

7. The regulations enjoined by the state court were adopted by the Director of Fisheries to comply with this Court's allocation order. The Thurston County Superior Court's injunction against enforcement of these regulations therefore brings that court into direct conflict with specific orders of this Court. In addition to the order of August 10, 1977, the state court's action is in direct conflict with this Court's decision of March 12, 1974 (384 F. Supp. 312) which has been affirmed by the United States Court of Appeals for the Ninth Circuit and is now final and binding (520 F.2d 676, 693, cert. denied 423 U.S. 1086). That decision orders, in part, that:

> The defendants will make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish. 384 F. Supp. at 420.

8. If the state court's judgment is permitted to stand, the orders of this Court will be rendered ineffective and plaintiff tribes will again be denied their federally determined rights. Therefore, it now appears that in order to protect and effectuate the prior orders of this Court, and to preserve its jurisdiction over the subject matter, it is necessary that this Court stay the state court's preliminary injunction and enjoin the state courts' from proceeding further in contravention of this Court's orders.

CONCLUSIONS OF LAW

1. Based upon the legal arguments presented, this Court is satisfied that it has jurisdiction to enjoin the state court proceeding referred to, within the express exceptions to the anti-injunction statute, 28 U.S.C., Section 2283 and under the authority of Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957). The Court believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the Federal treaty rights declared therein.

2. It is clear beyond reasonable question that the state court injunction referred to above, if allowed to remain in effect, would prevent defendants from complying with this Court's order to manage the non-treaty allocation share in such manner as to protect fish needed for escapement and not interfere with the treaty fishermen's opportunity to catch their allocated share of the harvestable resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal Court, and state court proceedings instituted by non-parties to this lawsuit cannot be allowed to frustrate either the jurisdiction or the final determination of this Court.

3. Based upon the above findings, the data, memoranda and arguments recently received and reviewed in connection with this Court's Order dated August 10, 1977, the Temporary Restraining Order dated August 26, 1977 and this motion, the Court concludes that gross inequities between treaty and non-treaty harvest will occur if defendants are prevented from enforcing their adopted regulations. Because substantial fish resources will be lost for this year to plaintiff tribes if not harvested during the current and upcoming seasons, the immediate threat of substantial economic harm and serious hardship to many treaty right fishermen convinces this Court that prompt action is required to protect Federal treaty rights that this Court has found are constitutionally guaranteed as the law of the land and to assure the viability of this Court's orders. Plaintiffs herein have overwhelmingly met their burden of proof to show that enforcement of the proposed Department of Fisheries regulations limiting the fishing time on the non-treaty allocation would achieve at least partial compliance with this Court's directives to make additional fish available for harvest by treaty right fishermen, and that prohibition by the state court of enforcement of that regulation presents an immediate threat of substantial economic harm and serious hardship to plaintiff tribes. Thus, while plaintiffs have demonstrated irreparable injury to the treaty fishermen if the injunction is not granted, defendants have not demonstrated a substantial injury which will result to either themselves or other interested persons as a result of issuance of the preliminary injunction.

4. The Court further concludes that the public interest will best be served here by permitting the United States government to honor its treaty obligations to the Indians and by this Court seeing that its valid, final judgments and orders are protected and effectuated.

5. For the reasons set forth above, the Court finds and concludes that the plaintiffs have a strong likelihood of prevailing in this cause following a trial on the merits and thus the preliminary injunction staying the state court preliminary injunction should issue.

6. Alternatively, the Court finds and concludes that not only have plaintiffs raised serious questions, but they have demonstrated that the balance of hardships tips sharply in their favor. See, William Inglis and Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).

For the reasons hereinabove stated, unless and until this Court orders otherwise, IT IS NOW HEREBY ORDERED AS FOLLOWS:

PRELIMINARY INJUNCTION

1. That the Superior Court of the State of Washington, County of Thurston, is hereby enjoined and prohibited from in any manner or to any extent enforcing the temporary injunction issued by said Court on August 24, 1977, in No. 58107, and from issuing any other order in said cause which in effect will prevent the Department of Fisheries from fully complying with the orders of this Court.

2. That defendants, State of Washington, Gordon Sandison, the Departments of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, shall not obey, carry out, enforce or otherwise treat as having any lawful force or effect the order of the Thurston County Superior Court for the State of Washington referred to in paragraph (1) above until further order of this court.

Rule 65(c), Federal Rules of Civil Procedure, pertaining to security necessary for issuance of injunctions, provides in part: "No such security shall be required of the United States or of an officer or agency thereof." The application for injunctive relief herein having been made by the United States, this Court may not require security therefore from the United States, and does not require such security from any parties joining in or supporting said application.

IMPLEMENTING ORDERS

For reasons not clear to this Court, the Department of Fisheries takes the anomolous position of opposing entry of this preliminary injunction issued above, while asserting the correctness and appropriateness of the regulations enjoined in the State Court proceeding. This Court's preliminary injunction confirms the propriety of the Department of Fisheries regulations. Moreover, this Court has not and will not direct, limit or in any manner whatever interfere with full exercise of the prerogatives, duties and discretion vested by State law in the Directors of the Departments of Game and Fisheries, except to the extent necessary to enforce the judgment and decree entered pursuant to Final Decision No. 1 and to restore or preserve the Indian treaty rights specified therein. Nothing in this Decision or in the above injunction should be construed or applied to the contrary.

However, due to the circumstances previously recited, and to aid in achieving an equal opportunity to both treaty Indian and non-treaty fisherman to harvest fish in the case area, this Court finds it necessary in aid of its jurisdiction and to protect and effectuate its judgment, to provide as follows:

IT IS HEREBY ORDERED THAT:

1. The defendants are required to enforce their regulations providing for management and control for purposes of conservation and over the non-treaty allocation share so that the treaty allocation shall not be encroached upon.

2. Regulations governing the non-treaty allocation, once adopted by the defendants in accordance with the Court's prior rulings and this order, shall not thereafter be relaxed or rescinded without prior notice to this Court and all parties to this action, unless consent of the affected plaintiff tribes has been obtained prior thereto.

3. To the extent reduction in the non-treaty fishery adopted in accordance with the Court's prior rulings already has been relaxed or rescinded prior to the entry of this order by reason of the preliminary injunction of the Thurston County Superior Court in Puget Sound Gillnetters Association v. Sandison, No. 58107, issued August 24, 1977, defendants shall cease immediately from carrying out directives, orders or policies in accordance with said preliminary injunction and shall resume forthwith to implement the regulatory schemes and policies previously adopted to effect its management control over the non-treaty allocation share.

4. If, at any time subsequent to the entry of this order, defendants are participants in legal proceedings which, in their judgment might possibly result in an order that could impair or otherwise affect adversely their ability to conform to the requirements of this Court's allocation order, or other orders in this case, defendants shall immediately so inform this Court and shall serve upon all parties to this action copies of all papers filed in such legal proceedings.

5. Defendants shall take such action as may be necessary to notify forthwith their officers, agents, employees, and attorneys, and those

persons in active concert or participation with them, of the contents of this order and the duties and obligations defined herein.

IT IS SO ORDERED, ADJUDGED and DECREED, effective immediately upon entry hereof this 31st day of August, 1977.

/s/
SENIOR UNITED STATES
DISTRICT JUDGE

Presented by:

JOHN C. MERKEL
United States Attorney

/s/
MICHAEL R. THORP
Attorney
Land and Natural Resources Division
U.S. Department of Justice

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs STATE OF WASHINGTON, et al., Defendants.	) CIVIL NO. 9213) TEMPORARY RE-) STRAINING ORDER) RE: ENFORCEMENT) OF 1977) FISHERIES

Based on the memoranda, oral representations of State, Tribal and Federal attorneys stated in open court on August 30, 1977, and the August 29, 1977 Affidavit of Duane Phinney of the Washington Department of Fisheries, the court finds as follows:

(1) The State of Washington, Department of Fisheries intends to comply with the orders of this court, but that their citations will not be prosecuted by local prosecutors.

(2) The State Assistant Attorney General has represented to this court that the Prosecutor of Whatcom County has already notified the Washington Department of Fisheries that he will not prosecute any citations issued in his jurisdiction, which includes Bellingham Bay.

(3) The Assistant Attorney General, James Johnson, representing the State of Washington, has specifically requested this court to assume enforcement responsibility for the 1977 fishing season.

Based on the above findings, which are not in dispute, the court finds that the State of Washington is unable at this time to control its licensed fishermen and its courts so as to be in compliance with orders and rulings of this court.

The court further finds that this situation, if permitted to continue, will lead to a breakdown of law and order in the waters of the case

area, the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource.

Therefore, it is hereby ORDERED that:

1. All reef net, gill net and purse seine fishermen licensed by the State of Washington, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, the Grays Harbor Gillnetters Association and all persons in active concert or participation with them are hereby temporarily restrained from engaging in, taking, possessing, or selling salmon of any species in violation of this court's orders of August 10, 1977 or August 31, 1977 or State regulations adopted pursuant to the orders of this court.

2. It is further ORDERED that the United States, through its agencies and officers, take all necessary steps to:

(a) Insure on orderly harvest of fish;
(b) to preserve the resource; and
(c) to aid the court in the enforcement of the terms of this Temporary Restraining Order or subsequent orders of this court.

3. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal Service and such other agencies as may be appropriate and the State of Washington through its Department of Fisheries and such other agencies as may be appropriate, are hereby ordered to draft and serve copies of a notice from this court, incorporating by reference this Temporary Restraining Order, the orders of this court and the closures promulgated by the State of Washington pursuant to those orders, upon any fisherman fishing in violation of these closures; and the United States and State of Washington are hereby ordered to cite any fisherman who continues to fish in violation of said closures to appear before the United States District Court to show cause why he should not be held in contempt.

4. The issuance of a Temporary Restraining Order is necessary to prevent irreparable injury to the plaintiff tribes and their members.

5. The issurance of a Temporary Restraining Order is necessary in aid of this court's jurisdiction and to protect and effectuate this court's prior judgments.

IT IS FURTHER ORDERED that a hearing be held on Monday, September 12, 1977 at 1:30 p.m. to consider whether this Temporary Restraining Order should be made a preliminary or permanent injunction.

IT IS HEREBY SO ORDERED this 31st day of August, 1977.

/s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs STATE OF WASHINGTON, et al., Defendants.	) CIVIL NO. 9213) MEMORANDUM) ORDER AND) PRELIMINARY) INJUNCTION

The court has fully reviewed and carefully considered the motions of plaintiff, United States of America, and the plaintiff intervenor Tribes, the supporting and opposing memoranda, affidavits and attachments thereto, the documentary and testimonial evidence offered in open court at hearings held August 8 and August 25, 1977, as well as evidence offered at a hearing held on July 21, 1977 on aspects relevant to the present motions, and the oral argument of counsel. The Memorandum Order and Preliminary Injunction signed and entered by this court on August 10, 1977 and the clarifying minute order entered on August 12, 1977 are hereby vacated and superseded in their entirety by this Memorandum Order and Preliminary Injunction.

Based on all of the evidence, the prior holdings and decrees in this case, and certain decisions of the Supreme Court of the State of Washington, this court FINDS, HOLDS and ORDERS as follows:

1. The defendant, State of Washington, and its courts, legislature and fisheries management and regulatory agencies and officers have failed and refused to manage and regulate the harvest of the fishery resources that are subject to the reserved treaty fishing rights of plaintiff tribes in a manner that will comport with the prior decrees of this court in this case declaring and enforcing those reserved fishing rights which were secured by the treaties of

the United States referred to in Final Decision #1 in this case.

2. The defendant, State of Washington, through its attorneys herein, and the defendant Director of Fisheries, have stated that they are unwilling or unable to so manage and regulate such fishery resources and harvest and have stated that such inability is based, at least in part, on State law as recently pronounced by the Washington State Supreme Court and on the refusal of the State legislature to enact legislation authorizing the Department of Fisheries to regulate the harvest of the resource in conformity with the requirements of this court's prior decrees. (Tr. 8/8/77, pages 139-140, 160-162).

3. The inability or unwillingness to so manage and regulate such fishery resources and harvest imminently threatens to deprive the plaintiff tribes of their treaty rights as previously decreed by this court unless this court provides for the allocation, under its direction and control, of the amount of fish from each run that must be reserved from State harvest control, and the amount that must be reserved for spawning escapement, in order to insure the plaintiff's tribes their right to take fish, both now and in the future, to the extent provided by this court's decrees.

4. The Supreme Court of the State of Washington held in the case of Puget Sound Gillnetters Association, et al. v. Donald Moos, et al., No. 44401, decided June 9, 1977 (565 P.2d 1151), that the Department of Fisheries has a "statutory duty" under State law "to authorize the harvesting of salmon not required for . . . spawning" and that it "may restrict the harvesting of salmon by the commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon" and further that in carrying out this duty to authorize commercial harvest, the Director of Fisheries may not "allocate fish among competing

claimants for purposes other than conservation," and specifically that he may not "allocate fish to treaty Indians or to non-Indians," and that "every fisherman in a class must be treated equally, and . . . given an equal opportunity to fish. . . ." In this regard the Supreme Court of the State of Washington held that treaty Indians are not a separate class, but that each Indian is a citizen of the United States who may not be "granted special privileges and immunities. . . . Distinctions between fishermen based upon their race or ethnic background are not proper." It reaffirmed this holding on July 21, 1977 in Purse Seine Vessell Owners Association v. Moos, No. 43938.

5. The Director of the Department of Fisheries has stated publicly that as a State officer he feels bound to comply with the State Supreme Court holding in case No.4 4401 even though the State court did not issue a writ of mandamus to order him to comply. (Tr. 8/8/77, page 137, 160-162). In declining to issue the writ the State court said, "We have full confidence that the Director will abide by our decision." (565 P.2d at 1152).

6. The holdings of the Washington Supreme Court are contrary to the affirmed decision and decree of this court on the federal questions of the nature and scope of the treaty fishing rights of Indian tribes and the obligations of the State toward those rights, which decision and decree are binding upon the defendants in this case, including the State of Washington and its Director of Fisheries. Specifically, this court has decreed that the treaty tribes hold the reserved treaty right to harvst anadromous fish. This reserved right is distinct from rights or privileges of others, does not depend upon State law, and may not be qualified by any action of the State. This court has also decreed that the tribes reserved the right to share equally with the non-treaty citizens of the United States the opportunity to take fish at their usual and accustomed places and

that the treaty fishermen as a group and non-treaty fishermen as a separate group are each to have the opportunity to take up to fifty percent (50%) of the harvestable number of fish that would reach such fishing places; that the Department of Fisheries' harvesting plan must provide for an opportunity for treaty Indians to take this share; and that State laws or regulations which affect the volume of anadromous fish available for harvest by a treaty tribe must be designed so as to carry out the purpose of the treaty provision. Neither the treaty Indians nor the non-treaty fishermen may fish in a manner so as to destroy the resource or to preempt it totally. This court has also decreed that the defendants must make "significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objective of the court's decision. . . ." (384 F. Supp. at 343, 345, 346, 401, 403, 406, 407, 408 and 420).

7. The defendant, Director of Fisheries, and Director of Game, have each on occasion applied RCW 75.12.060 and RCW 77.16.060 to restrict the exercise of the fishing rights of certain plaintiff tribes contrary to the holding and decree of this court. (Ex. PL 10-9, PL 110, P.L 111; Tr. 8/8/77, (Sandison), page 143-146).

8. On July 27, 1977, the Director of Fisheries, without prior notice to the plaintiffs or this court, adopted an emergency order closing certain areas, including State Management Area 6A, to all treaty Indian salmon fishing except when opened by regulations of the International Pacific Salmon Fisheries Commission. (Ex. PL 103). The United States had previously taken official action to reject IPSFC control over the treaty Indian sockeye and pink salmon fisheries and to regulate such fisheries in IPSFC waters by regulations of the Department of the Interior. (42 Fed. Reg. 31450-31453; Tr. 8/8/77, 147-148).

9. On or about June 1, 1977, the Director of Fisheries adopted and filed with this court an emergency regulation closing Indian Treaty

Puget Sound Salmon Management and Catch Reporting Areas 10B, 10C and 10D to commercial salmon fishing by treaty Indians for the reason that the existing forecast indicated that the 1977 Lake Washington sockeye run would be below spawning escapement needs and needed "complete protection." The Director advised the tribes and this court that if later data indicated a run in excess of escapement needs, the sport and net fishery could be authorized. (EX. USA 141; USA 142).

10. On July 14, 1977 the Director of Fisheries adopted an emergency regulation opening areas 10C and 10D (Lake Washington) to sport fishing for sockeye commencing July 16, 1977 giving as his reason that the run size was then forecast to be 44,000 fish more than are needed for escapement and that an emergency opening was necessary to harvest those excess fish. (Ex. USA 143). The Director refused tribal requests to rescind his conservation closure of the treaty Indian fishery on these same fish for the reason that RCW 75.12.010 prohibited a treaty net fishery in those areas. (Ex. USA 144; Tr. 8/8/77, page 151).

11. Although no conservation justification for a prohibition of the treaty fishery in Lake Washington or in management area 10B existed subsequent to July 14, 1977 the Director did not rescind the closure of the treaty fishery until July 21, 1977 after the plaintiffs had obtained that date for hearing in this court on a motion for injunctive relief against the continuance of the closure. (Ex. F 111). By that time, the Department of Fisheries had established that the harvestable surplus in the run was 61,000. (Tr. 7/21/77, page 151).

12. Under the protection of a Temporary Restraining Order of this court, the Muckleshoot and Suquamish Tribes authorized tribal fisheries to take up to 30,500 fish. The State and the tribes monitored this fishery. This fishery was closed by the Muckleshoot and Suquamish Tribes after tribal members had taken their allotted number of fish.

13. On July 22, 1977 the Director of Fisheries adopted regulations for the 1977 commercial harvest of Puget Sound chinook, coho and chum salmon runs. (Ex. PL 102). Neither the regulations nor the accompanying statement of "1977 Regulatory Considerations" makes any reference to treaty rights of any Indians, nor do they contemplate compliance by the State through its Department of Fisheries with decrees and orders of this court in this case. The regulatins are intended to apply to treaty Indians and non-treaty fishermen alike. (Ex. PL 121; Tr. 8/8/77 (Sandison), pages 139, 171-172). The regulations fail to provide the plaintiff tribes with the opportunity to harvest their share of such salmon as decreed by this court and are in violation of the decrees and orders of this court.

14. RCW 75.12.010 is broader than necessary for the preservation of the fishery resource and does not meet the standards previously declared by this court for State measures which may lawfully be applied to restrict members of treaty tribes from exercising their tribe's treaty fishing rights or which may be applied to authorize non-treaty fishing within limitations prescribed by the decrees of this court.

15. The Fisheries Advisory Board appointed a Technical Committee consisting of five biologists representing treaty tribes and four biologists from the Department of Fisheries to develop a joint report on the run sizes, escapement goals, harvest numbers, troll and sport interception rates and ceremonial and subsistence numbers for 1977 runs of chum and coho salmon returning to the various Puget Sound salmon management areas. That committee's unanimous report was approved by the Fisheries Advisory Board on August 24, 1977 and filed with the court on August 25, 1977. On the basis of that report the court finds that harvest allocations for such runs shall be based upon the following data, subject to in-season updates of pre-season estimates of run sizes and harvest numbers to be determined as provided in this Order:

COHO

Management Regions	Run Size	Escapement Goal	Total Harvestable Number	*Prior Interceptions
Straits	59,000	11,000	48,000	12,000
Nooksack-Samish	122,000	4,000	118,000	24,000
Skagit	66,000	35,000	31,000	13,000
Snohomish-Stillaguamish	198,000	66,000	132,000	39,000
South Sound	513,000	45,000	468,000	100,000
Hood Canal	98,000	22,000	76,000	19,000

*Excludes 5,000 coho interceptions by treaty Indians

CHUM

Straits	No harvestable runs expected			
Nooksack-Samish	12,300	6,000	6,300	0
Skagit	42,500	56,200	0	0
Snohomish-Stillaguamish	18,000	22,600	0	0
South Sound	250,500	113,000	137,500	0
Hood Canal	204,000	142,000	62,000	0

16. The following figures represent subsistence and ceremonial and on-reservation estimates of treaty catch as previously filed by plaintiff tribes with this Court:

Subsistence and Ceremonial
(The below listed number should be added to the run size and harvestable numbers above listed)

	COHO	CHUM
Straits	2,000	300
Nooksack-Samish	4,000	5,000
Skagit	1,600	1,200
Shohomish-Stillaguamish	2,200	5,500
South Sound	17,000	11,300
Hood Canal	3,600	3,500

On Reservation

	COHO	CHUM
Straits	12,000	-
Nooksack-Samish	no estimates available	
Skagit	3,400	-
Snohomish-Stillaguamish	7,800	-
South Sound	28,000	14,000
Hood Canal	12,000	14,000

The percentage allocations ordered herein for coho and chum salmon are solely limited to the 1977 Puget Sound salmon runs and are based on the facts, circumstances and equities peculiar to this year's salmon runs. These allocations of coho and chum salmon shall not be interpreted in any way as an express or implied modification by this court of Final Decision #1.

17. Coho Salmon Allocation

For 1977 the allocations of Puget Sound area coho salmon to the treaty Indian fisheries, including fish taken for subsistence and ceremonial purposes and those taken on the reservations, shall be 45% of the total harvestable numbers shown in paragraph 15 above and the allocations to the non-treaty commercial fisheries shall be 55% of such harvestable numbers.

Because North Sound treaty tribes have benefitted from fishing on unusually abundant sockeye and pink salmon runs, while the South Sound tribes have not, the court orders, in the interest of equity, that the 45% allocation to the treaty fishery be divided so that the share in South Sound is closer to 50%, while that in North Sound is somewhat further from 50%, as shown below:

Approximate Percentage of Total Harvestable Coho

Area	Non-Treaty Fishermen	Treaty Fishermen
Strait of Juan de Fuca	55	45
Bellingham Bay-Samish Bay (Nooksack-Samish Rivers)	60	40
Skagit River	63	37
Snohomish-Stillaguamish R.	58	42
South Sound	52	48
Hood Canal	55	45

Purposes of the above devision of catch are to give a 55%-45% overall allocation, and to give a sharing formula of the salmon runs inside Puget Sound which will approximate 60% to the treaty fishery and 40% to the non-treaty fishery in all regions except Bellingham Bay, which is approximately 50% to the treaty fishery and 50% to the non-treaty fishery. The allocation percentages inside Puget Sound are intended to provide an allocation that can be attainable in practice without complex manipulations in management of the treaty and non-treaty fisheries.

These percentages shall continue to apply to any revision in those harvestable numbers that may be found to be required because of revised estimates or run sizes.

(a) Strait of Juan de Fuca Tributaries

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch in Puget Sound of the salmon originating in the Strait of Juan de Fuca tributaries to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 22,500 coho to treaty Indian fishermen and 15,500 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 12,000 coho in the troll and sport fishery prior to their return. This number, when added to the 15,500 coho allocated to non-treaty fishermen, will approximate 55% of the harvestable number of coho.

(b) Bellingham Bay-Samish Bay (Nooksack-Samish Rivers)

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 50% of the allowable catch of the Bellingham Bay - Samish Bay (Nooksack-Samish Rivers) salmon in Puget Sound to treaty Indian fishermen and 50% to non-treaty fishermen. On the basis of the run size estimates now available the allocation would be

49,000 coho to treaty Indian fishermen and 49,000 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 24,000 coho in the troll and sport fishery prior to their return. This number, when added to the 49,000 coho allocated to non-treaty fishermen, will approximate 60% of the total harvestable number of coho.

(c) Skagit River

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of the Skagit River salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 12,000 coho to treaty Indian fishermen and 7,600 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 13,000 coho in the troll and sport fishery prior to their return. This number, when added to the 7,600 coho allocated to non-treaty fishermen, will approximate 63% of the total harvestable number of coho.

(d) Snohomish-Stillaguamish Rivers

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation orderd by the court can be achieved by an allocation of 60% of the allowable catch of the Snohomish-Stillaguamish salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 57,000 coho to treaty Indian fishermen and 38,500 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 39,000 coho in the troll and sport fishery prior to their return. This number, when added to the 38,500 coho allocated to non-treaty fishermen, will approximate 58% of the total harvestable number of coho.

(e) South Sound

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of South Sound salmon in Puget Sound

to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 231,000 coho to treaty Indian fishermen and 154,000 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 100,000 coho in the troll and sport fishery prior to their return. This number, when added to the 154,000 coho allocated to non-treaty fishermen, will approximate 52% of the total harvestable number of coho.

(f) Hood Canal

Based upon the agreed total numbers of coho shown in the table, the court is satisfied that the allocation ordered by the court can be achieved by an allocation of 60% of the allowable catch of the Hood Canal salmon in Puget Sound to treaty Indian fishermen and 40% to non-treaty fishermen. On the basis of the run size estimates now available, the allocation would be 36,400 coho to treaty Indian fishermen and 24,200 to non-treaty fishermen. The non-treaty fishermen will have taken an estimated 19,000 coho in the troll and sport fishery prior to their return. This number, when added to the 24,200 coho allocated to non-treaty fishermen, wil approximate 55% of the total harvestable number of coho.

18. Chum Salmon Allocation

For 1977 the allocations of Puget Sound area chum salmon to the treaty Indian fisheries, including fish taken for subsistence and ceremonial purposes and those taken on the reservations, shall be 50% of the harvestable numbers shown in paragraph 15 above and the allocations to the non-treaty commercial fishereis shall be 50% of such harvestable numbers. These percentages shall continue to apply to any revison in those harvestable numbers that may be found to be required because of revised estimates of run sizes.

Because there are no significant prior interceptions of chum salmon, the allocation of chum salmon is a one-step process. Accordingly, for chum salmon originating in the Bellingham Bay-Samish Bay (Nooksack-Samish Rivers) the

allocation is 5,650 chum salmon to the treaty fishery and 5,650 chum salmon to non-treaty fisheries.

For the chum salmon originating in South Sound the allocation is 74,400 chum salmon to the treaty fishery and 74,400 chum salmon to non-treaty fisheries.

For the chum salmon originating in Hood Canal the allocation is 32,750 chum salmon to the treaty fishery and 32,750 chum salmon to the non-treaty fisheries.

19. Chinook Salmon Allocation

Chinook salmon are hereby allocated to treaty Indian and non-treaty fishermen on the basis of a percentage of the Washington Department of Fisheries' present run size predictions.

(a) Bellingham Bay Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 60% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to trety Indians and 40% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size predictions, there would be 47,200 salmon for treaty Indians and 31,500 salmon for non-treaty fishermen. Preliminary estimates disclose that the non-treaty troll and sport fishery will take an estimated 10,600 chinook salmon prior to their return to Bellingham Bay. This number, when added to the 31,500 chinook salmon allocated to non-treaty fishermen, will approximate 50% of the harvestable number of chinook salmon after deducting the on-reservation, ceremonial and subsistence catches.

The report of the Fisheries Advisory Board of August 23, 1977 on the subject of the Bellingham Bay chinook fishery informed the court that the non-treaty share of chinook salmon in Bellingham Bay had been reached and therefore the

non-treaty fishery was scheduled to close August 24, 1977.

(b) Skagit Bay Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 70% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to treaty Indians and 30% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size prediction, there would be 6,600 salmon for treaty Indians and 2,800 salmon for non-treaty fishermen. Preliminary estimates disclose that the non-treaty troll and sport fishery will take an estimated 1,800 chinook salmon prior to their return to Skagit Bay. This number when added to the 2,800 chinook salmon allocated to non-treaty fishermen will approximate 50% of the harvestable number of chinook salmon after deducting the on-reservation, ceremonial and subsistence catches.

The report of the Fisheries Advisory Board of August 23, 1977 on the subject of the steps taken by the Washington Department of Fisheries to comply with the Memorandum Order and Preliminary Injunction signed by this court on August 10, 1977 informed the court that Skagit Bay was closed to non-treaty fishermen August 18, 1977 because the non-treaty allocation was reached.

(c) Hood Canal Chinook Salmon:

The Court is satisfied, based on the advice of its technical advisor, Dr. Richard Whitney, that the proper allocation to treaty Indian fishermen will be achieved by an allocation of 75% (which includes on-reservation, ceremonial and subsistence catches) of the allowable catch in Puget Sound to treaty Indians and 25% to non-treaty fishermen.

On the basis of the present Washington Department of Fisheries run size prediction, there would be 12,500 salmon for treaty Indians and

4,100 salmon for non-treaty fishermen. Preliminary estimates disclose that the non-treaty troll and sport fishery will take an estimated 4,700 chinook salmon prior to their return to Hood Canal. This number when added to the 4,100 chinook salmon allocated to non-treaty fishermen will approximate 50% of the harvestable number of chinook salmon after deducting the on-reservation, ceremonial and subsistence catches.

The court is informed by the court's technical advisor, Dr. Richard Whitney, that the treaty allocation of chinook salmon in Hood Canal has been reached and the treaty fishery has therefore been closed.

(d) Closures.

Non-treaty fishermen shall not fish commercially for chinook salmon in any Puget Sound area (including Strait of Juan de Fuca), other than Hood Canal, as above specified, unless prior approval of the regulations authorizing such fishing is obtained from the court's Fisheries Advisory Board or the court.

Treaty fishermen shall not fish in Hood Canal, as above specified, unless prior approval of the regulations authorizing such fishing is obtained from the court's Fisheries Advisory Board or the court.

20. Gordon Sandison is the duly appointed Director of Fisheries of the State of Washington. Ralph W. Larson is the duly appointed Director of Game of the State of Washington.

21. The issuance of a preliminary injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members.

22. The United States of America and the plaintiff tribes have no adequate remedy at law.

23. It is necessary in aid of this court's jurisdiction and to protect and effectuate its judgments that a Preliminary Injunction be issued as hereinafter set out.

REMOVAL OF TREATY ALLOCATION FROM STATE EXERCISE OF JURISDICTION

The Supreme Court of the United States has held that while the states have jurisdiction under their police power to regulate the off-reservation exercise of the treaty Indians' reserved fishing right to the extent necessary to preserve the resource, they do not have the authority to qualify that right, even though the Indians are now citizens of the United States. Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968). That Court has not hesitated to prohibit the application to treaty Indians of state laws that went beyond this limited power of regulation. Antoine v. Washington, 420 U.S. 194 (1975); Washington Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Tulee v. Washington, 315 U.S. 681 (1942). The Court of Appeals for this Circuit has done likewise. United States v. Washington, 4520 F.2d 676 (1975) (this case); Holcomb v. Confederated Tribes, 382 F.2d 1013 (1967); Maison v. Confederated Tribes, 314 F.2d 169 (1963); Makah v. Schoettler, 192 F.2d 224 (1951).

On the basis of the above findings of State refusal to manage the fishery resources that are subject to the reserved and federally-secured rights of the plaintiff tribes and to regulate the harvest thereof in a manner that conforms to this Court's prior holdings and decrees that have now become final and binding as a result of completion of appellate review, this Court reluctantly, but necessarily, finds that it is necessary for this Court to make the allocations required to effectuate those decrees, including approval of allocations of fish necessary for propagation escapement to perpetuate the fish runs, and to enjoin the State from exercising any form of jurisdiction over the fish so allocated without obtaining the express approval of this Court in a manner herein provided for.

It is furhter necessary that this court require the defendants to adopt and enforce appropriate regulations to prevent non-treaty fishermen from taking more than their allocated shares of the runs or from taking fish needed for propagation to perpetuate the runs.

Accordingly, it is HEREBY ORDERED that:

A. The 1977 allocations of Puget Sound salmon shall be those adopted in this Memorandum Order and Preliminary Injunction unless modified by this court.

B. The Washington Department of Fisheries shall be responsible for developing updated estimates of run sizes for coho and chinook salmon as each particular fishery develops and advise the court, the court's Technical Advisor, and the Northwest Indian Fisheries Commission who shall in turn be responsible for notifying each affected treaty Indian tribe thereof.

As to chum salmon the court hereby refers the matter to the Fisheries Advisory Board for the development of an appropriate method of updating in-season run size estimates.

C. Any challenges of the Washington Department of Fisheries shall be presented to the Fisheries Advisory Board pursuant to the established procedures.

D. Jurisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants, State of Washington, Director of Fisheries, and State Game Commission and Director, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who have actual notice of this or subsequent orders are hereby enjoined from exercising jurisdiction or any form of harvest management authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries, except as specifically provided for in this or subsequent order of this court.

E. The defendants, State of Washington, Director of Fisheries, State Game Commission and Director, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who have actual notice of this or subsequent orders are hereby further enjoined to manage and regulate the harvest of the portions of such runs not herein removed from the defendants' jurisdiction and control in such manner as will assure the escapement from non-treaty harvest of the numbers of fish allocated to propagation escapement and to the treaty fisheries pursuant to this order. Copies of all State regulations governing the non-treaty harvest in the case area shall be filed with the court's Fisheries Technical Advisor, each affected plaintiff tribe, the United States Fish and Wildlife Service, the Northwest Indian Fisheries Commission, and their respective counsel. The State shall carefully monitor any non-treaty fishery and immediately advise the court when any non-treaty catch meets the quota specified in this court's allocation and also advise this court of any encroachment on spawning escapement goals and of the extent and effectiveness of State efforts to prevent such encroachment.

REGULATION OF TREATY ALLOCATION

F. Regulation and harvest control over the fish allocated to treaty fishermen pursuant to this Order shall remain with the court. Tribal regulations governing such fishery shall be adopted and filed with the court in strict conformance with Final Decision No. 1 and subsequent orders of this court.

G. Nothing in this Order shall diminish the immunity from state regulation or affect the jurisdiction of self-regulatory tribes as prescribed by prior Orders of this court, except that such tribes shall be bound by the allocations made effective pursuant to the provisions of this Order.

H. The United States, through its appropriate agencies and officers, is hereby directed to monitor fishing activities in the waters of the case area for and on behalf of the court and to report to the court on a daily basis, with copies to all affected parties, regarding the extent of compliance with State, tribal and court determined regulations and to immediately report any substantial violations thereof to the court for further action as the court deems appropriate.

MISCELLANEOUS PROVISIONS

I. The defendants shall not apply or enforce RCW 75.12.010 or the regulations of the Director of Fisheries concerning certain Puget Sound salmon fisheries adopted July 22, 1977, to regulate, limit or restrict the exercise of the fishing rights of a treaty tribe or to authorize a non-treaty harvest in excess of the amounts allocated for that purpose pursuant to this order.

J. The defendants shall not adopt, apply or enforce any regulations--including Directory of Fisheries Order No. 77-60--to regulate, limit or restrict any fishing by members of a treaty tribe that is authorized by regulations of the United States or any of its agencies without first obtaining the prior express approval of this court.

K. The defendants shall not apply or enforce any emergency regulations adopted under the permission of paragraph 19 of this court's Injunction of March 22, 1974, as modified by the Order of December 27, 1976, Order Re: Rules of Procedures for Fisheries Advisory Board, to limit or restrict the exercise of the fishing rights of a treaty tribe beyond the period for which the facts and circumstances of the emergency recited in the statement filed with this court continue to exist or beyond thirty days after the adoption of such emergency regulations, whichever is shorter, provided that for regulations heretofore adopted, said thirty-day period shall commence on the date of this Order.

The foregoing durational limitation on emergency orders shall not preclude the defendants from adopting, in accordance with the approved procedural and other provisions of this court's orders, continuing regulations or renewing emergency regulations to deal with conditions that extend beyond thirty days. The Defendants shall not, without the prior approval of this court, adopt, apply or enforce any emergency closure or limitation of treaty fishing if the non-treaty fishermen have taken more than the number of fish allocated pursuant to this order for the non-treaty harvest from any run affected by such regulation.

L. The portions of this court's order of March 22, 1977 entitled "Interim Plan and Stay Order Pending Final Decision on Appeal" which stay certain portions of Final Decision No. 1, the Decree of February 12, 1974 and of the Injunction of March 22, 1974 are hereby terminated.

M. Gordon Sandison is hereby substituted for Donald W. Moos and Ralph W. Larson is substituted for Carl Crouse as Intervenors-Defendants herein, but this does not relieve Donald W. Moos as a defendant with respect to the separate Motions of Certain Tribes and of the United States for Sanctions for Failure to Make Discovery dated November 30, 1976, and December 2, 1976, respectively.

IT IS SO ORDERED, ADJUDGED AND DECREED this 31st day of August, 1977.

/s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES, et al., Plaintiffs, vs STATES OF WASHINGTON, et al., Defendants	)))))	CIVIL NO. 9213 MEMORANDUM ADOPTING SALMON MANAGEMENT PLAN

The court has carefully reviewed and fully considered the report of the court's Fisheries Advisory Board, dated July 14, 1977, concerning an agreed upon salmon management plan for 1977, subsequent modifications thereto as proposed by the parties and the court's technical advisor, Dr. Richard R. Whitney, the oral argument of counsel presented in open court at a hearing held August 30, 1977, and the oral recommendation of the court's technical advisor, Dr. Whitney.

Upon careful consideration and review it appears that the parties, with only a few exceptions, are in basic agreement. It is also clear that all parties, the court's technical advisor, and the court agree that a salmon management plan for 1977 is essential. Moreover, in the opinion of the court it is imperative that a salmon management plan be adopted by this court forthwith.

Accordingly, the court adopts the following plan, effective immediately, which in the opinion of the court will best accommodate the interests of all parties. However, the court recognizes that this plan is not an end, in and of itself. Therefore, the court instructs the parties to continue to work together with the court's technical advisor, and through the Fisheries Advisory Board, to refine issues that may still require clarification, modification, or development, such as the three points raised by Dr. Whitney in his memorandum to the court dated August 30, 1977, and to present to the court for approval any proposed clarifications to which all parties agree.

The following plan shall continue in effect until May 30, 1982. However, on or before May 1

of each succeeding year, beginning with 1978, the parties are instructed to confer with each other and the court's technical advisor with respect to any recommended clarifications and/or modifications of any provisions contained in the salmon management plan then in effect. If no modifications are proposed to the court prior to May 15 of any year, the then existing salmon management plan will automatically continue in effect for another year.

1. Preamble

1.1 The prupose of this plan is to establish guidelines for management of salmonid resources originating in or passing through Washington waters from the mouth of the Strait of Juan de Fuca eastward (Puget Sound). The parties, hereto, all Puget Sound Treaty Tribes, and the State of Washington, agree to a philosophy of cooperation in implementing management programs to maintain, perpetuate and enhance the salmonid resources.

1.2 This plan is intended to insure that treaty fishermen and non-treaty fishermen subject to their respective regulatory authorities shall be accorded the opportunity to harvest their shares as determined in United States v. Washington, 384 F. Supp. 312, aff'd 520 F.2d 676, cert. denied 423 U.S. 1086 (1976).

1.3 The parties agree to enact and recommend for enactment by the Pacific Fishery Management Council, appropriate regulations for the ocean salmon fishery that will provide for adequate escapement of salmon into Puget Sound waters to achieve the goals and purposes of this plan.

1.4 The parties shall advocate and recommend to the appropriate governmental and regulatory entities, international agreements to reduce foreign interceptions, particularly Canadian, of salmonids originating from Puget Sound.

1.5 The duration of this plan shall be for five (5) years from the date of acceptance by the court, subject to annual review, renewal, and modification, except that the provision (Sec 7.2) for the annual adjustment of shares shall be modified only upon terms that are equitable.

1.6 Where action of the parties is required in this plan, failure to act or to reach agreement shall be resolved as provided in section 11.

1.7 This order supplements and where inconsistent modifies the order on certain questions re: Fisheries Management, dated April 13, 1976, United States v. Washington, Civil No. 9213 WD Wash, which is hereby extended and shall remain in effect until further order of the court.

This order also supplements and, where inconsistent, modifies the Order for Program to Implement Interim Plan, dated October 8, 1974 as extended by the Minute Order dated April 5, 1976 and the Order Re: Rules of Procedure for Fisheries Advisory Board and Resolution of Disputes, dated December 17, 1976.

This order, for example, removes from the court much of the burden of making equitable adjustments through an automatic adjustment mechanism (Section 7.2).

2. Definitions - Except where the context clearly requires otherwise, the following terms used in this plan have the following meanings:

2.1 Prior net interceptions. Harvest by net fisheries of a run outside of its region of origin. Computed separately for treaty and non-treaty fishermen.

2.2 Region of origin. A geographic area which can be used to separate runs of the same species. The following geographic areas are recognized regions of origin for Puget Sound: 1) Strait of Juan de Fuca (Tributaries) 2) Bellingham-Samish Bays-Nooksack-Samish Rivers 3) Skagit 4) Stillaguamish-Snohomish 5) South Puget Sound, South of Snohomish System 6) Hood Canal 7) Canada.

2.3 Run. A stock, or group of stocks indentified for fishery management purposes which return to the same region of origin at similar times.

2.4 Run management period. A time interval during which a specific run is a target of a fishery in a particular harvest management area.

2.5 Run size. The total number of fish in a run.

2.6 Salmonid. Refers only to the following species:

Chinook - Oncorhynchus tshawytscha (also called spring, king, tyee, or blackmouth)
Coho - Oncorhynchus kisutch (also called silver, silverside, or hooknose)
Pink - Oncorhynchus gorbuscha (also called humpback or humpy)

Chum - Oncorhynchus keta (also called dog or Keta)
Sockeye - Oncorhynchus nerka (also called red or blueback)
Steelhead - Salmo gairdneri

2.7 Stock. A population of one species migrating to a particular lake or stream (or portion thereof) within a region of origin, at a particular season.

2.8 Twelve Questions. Order on Certain Questions re: Fisheries Management, dated April 13, 1976, United States v. Washington, W.D. Wash. No. 9213.

2.9 Viable natural stock. A stock for which a spawning escapement goal is established with the intent that the fishery will be managed to meet this goal.

3. Steelhead stocks. The parties shall manage from the premise that steelhead and salmon fisheries are intimately related.

The parties have made substantial progress in developing cooperative plans for scientific management of steelhead in their respective river systems, and it is important that these efforts result in firm management agreements prior to the 1977-1978 steelhead season.

Therefore, prior to Octover 1, 1977, the affected parties shall reach agreement regarding the management of steelhead fisheries system by system and stock by stock.

4. Escapement. Meetings of technical representatives regarding escapement goals during development of joint management principles for 1977 have proven especially productive. Therefore, the concepts of the "Initial Understandings on Technical Issues", of April 12, 1977, are essentially incorporated herein. This section, also, addresses the special problems which have arisen in past seasons from unilateral changes in escapement goals for hatchery stock requirements. Sections 4.2.1.1 and 4.3.1 will resolve such questions prior to the season in the future. Basic premises used are that harvest and enhancement policies and programs must be tempered with

the understanding that certain natural stocks of salmonids native to particular river systems should be preserved and protected sufficiently to insure their perpetual existence and production.

4.1 Escapement goals shall be developed separately for natural stocks and hatchery stock requirements.

4.2 Escapement goals for natural stock requirements apply to those stocks where egg deposition and fertilization occur naturally.

4.2.1 Escapement goals for natural stock requirements shall be established only for viable natural stocks.

4.2.1.1 The affected parties shall reach agreement as to which natural stocks shall be considered viable natural stocks.

The following natural runs have been determined by WDF not to be viable for harvest management purposes and in terms of achieving full natural spawning escapement goals WDF has conducted artificial production programs accordingly:

Bellingham Bay	1977, 78, 79, 80	Chinook
	1977, 78	Coho
Skokomish	1977, 78, 79, 80	Chinook
	1978	Coho
Carr Inlet	1977, 78	Coho
Puyallup River	1977, 78	Coho
Duwamish-Green River	1977, 78	Coho
Dungeness River	1977, 78	Coho
Elwha River	1977, 78	Coho

From the date of the adoption of this plan, parties shall agree on the enhancement planning that determines which natural stocks are considered viable and, therefore, determines future harvest management policies. This must, however, be in the manner and time frame described below:

a) for new facilities this shall first be considered during the site selection and facility planning stages.
b) for all facilities this shall be considered prior to annual hatchery programming, on or about August 1 of each year.

In reaching an agreement, the parties shall consider the following factors:

Impact upon existing hatchery stock harvest in the mixed stock fishery and the terminal fishery due to harvest rates necessary to provide for the natural escapement goal.

Harvestable numbers presently produced by a natural stock, or which may be projected based upon potentially available spawning round and/or rearing environment.

Unique characteristics of the natural stock with respect to behavior, physiology or morphology, which indicate value for future natural or hatchery stock development.

4.2.2 Except as otherwise agreed between all affected parties, a viable natural stock as determined in section 4.2.1.1 shall remain a viable natural stock from year to year.

4.2.3 Annually, prior to each fishing season, the affected parties shall reach agreement as to escapement goals for natural stocks, according to the following schedule:

fall chinook stocks - April 1
coho stocks - May 1
chum stocks - June 1
all other stocks - at least forty (40) days prior to the entry of the stock into Puget Sound.

4.2.4 Escapement goals for natural stocks shall be the number of spawners which would, in an average year, maximize the biomass of juvenile outmigrants subsequent to incubation and freshwater rearing, under average environmental conditions. These goals shall be consistent with the population limiting factors for each species, e.g., spawning area and/or rearing area. In cases where the total run size of a stock entering Puget Sound is less than the escapement goal,

it is understood that the escapement goal will not be fully attainable.

4.2.5 Except as otherwise agreed by all affected parties, escapement goals under this section 4.2 shall not be changed during the fishing season.

4.3 Escapement goals for hatchery stock requirements apply to those stocks from which eggs are collected and fertilized artificially.

4.3.1 The escapement goal for hatchery requirements is that number of spawners needed from a stock to meet an artificial production plan that is agreed upon by all affected parties.

4.4 Prior to the fishing season the affected parties shall reach agreement as to the methods for estimating actual escapement to the spawning grounds according to the following schedule:

fall chinook stocks - April 1
coho stocks - May 1
chum stocks - June 1
all other stocks - at least forty (40) days prior to the entry of the stock into Puget Sound.

4.5 Annually, prior to the fishing season, the Washington Department of Fisheries shall provide to all parties proposed draft reports on the following schedule:

fall chinook stocks - March 1
coho stocks - April 1
chum stocks - May 1
all other stocks - at least seventy (70) days prior to the entry of the stock into Puget Sound.

These reports shall be prepared on a system by system, species by species basis and shall contain proposed escapement goals for natural stock and hatchery stock requirements, and proposed methods and data for estimating escapement. These reports shall serve as a basis for discussions and to promote mutual understanding between the parties in reaching agreements as to these matters.

5. Run Size Estimation. The "Initial Understandings on Technical Issues," of April 12, 1977, demonstrate the clear agreement of all parties that some pre-season forecasts are inadequate and that in-season run strength estimation, together with pre-season forecasts, must be utilized for harvest management, both for providing escapement and allocation of the harvest.

5.1 Qualitative and quantitative pre-season forecasts shall be distributed by the Washington Department of Fisheries to all parties for each salmon species and region of origin. These reports shall include detailed data on brood year spawning escapements and artificial production releases, and other data and methods used to derive the pre-season forecasts.

5.2 Prior to June 1, 1978, the affected parties shall reach agreement as to the methods and estimates to be used for pre-season and in-season run strength estimation in each region of origin.

6. Harvest Rates. The following rules shall govern harvest management in all salmon fisheries, except as otherwise agreed by all affected parties.

6.1 The maximum harvest rate for a stock or set of stocks shall be defined as follows:

$$H = \frac{S - E}{S}$$

where,

H = the maximum harvest rate
S = the numerical abundance of a defined stock or set of stocks based on the best available estimate of run size (see Section 5).
E = the sum of escapement goals applicable to the stock or set of stocks.

6.3 The maximum harvest rates in each fishing area shall be determined separately for hatchery and viable natural stocks. Of the harvest rates computed in each fishing area, the lowest rate shall prevail in the management of the area during the course of the run, provided, however

that all affected parties may agree to a lower harvest rate.

6.4 Harvest rates in each fishing area shall be agreed upon between the State and all affected Tribes on the basis of escapement goals agreed upon between the parties.

7. Allocation of Harvest

7.1 Shares shall be computed separately for each species and region of origin, unless otherwise agreed between all affected parties.

7.2 Both the State and the Tribes recognize that fisheries management is not sufficiently precise to provide a prescribed harvest allocation between Treaty (fishermen) and non-Treaty (fishermen) on every run each year. Therefore, if Treaty or non-Treaty fishermen are not provided the opportunity to harvest their share of any given run as provided (by the orders of this court), deficiencies in numbers of fish shall be made up during the next succeeding run of the same species whenever practicable. If necessary, the deficiency for each given year shall be distributed and made up over a series of years, not exceeding five years. Annually, prior to June 1, the parties shall agree upon recommendations regarding implementation of this Section. This does not apply to Fraser River sockeye and pink salmon.

7.3 Catches made in Puget Sound marine waters having a mixture of stocks from two or more of the regions of origin in Puget Sound will be apportioned on the basis of comparative run size estimates for the stocks involved.

7.4 Prior catch projections by troll, and sport fisheries shall be agreed upon annually by the parties according to the following schedule:

spring chinook stocks - March 1
summer-fall chinook stocks - June 1
coho stocks - June 1

8. Catch Recording System. Reliable "soft" and "hard" data systems are needed for in-season fisheries management needs and for the finalizing catch and effort statistics, respectively. The

"soft" data system shall provide updated current catch and effort information as frequently as is necessary of in-season management purposes.

8.1 To the extent feasible, the "hard" data shall include catch of salmon and steelhead for ceremonial and subsistence use for all fisheries of the parties.

8.2 Processing of Treaty Indian fish tickets, correction of errors in such tickets, and collection of such data shall be carried out under an agreed upon joint catch monitoring system which recognizes the need and responsiblility of each Treaty Tribe to correct its own fish ticket information. Primary emphasis will be on achieving completeness and accuracy in the initial preparation of the fish ticket.

9. Timing and Contents of Tribal Regulations

9.1 The parties shall cooperate to develop a system for filing, compiling, transmitting, and cross-indexing both pre-season and in-season tribal and state regulations affecting Puget Sound harvests (e.g., common files accessed by computer terminals). In cases of conflicts, the system must identify the applicable regulations.

9.2 At least twenty-one (21) days prior to a run management period, tribes shall file, either separately or in common with other affected tribes, written regulations specifying at least the areas to be managed, the beginning and duration of the run management period, any appropriate gear restrictions and estimates of the amount of each gear type to be used under the regulation.

9.3 At least twenty-four (24) hours prior to effectiveness, tribes may supplement the preseason regulations by filing either separately or in-common with other affected tribes, written regulation modifications reflecting updated estimates of run strength specifying at least the duration and location of fishing to be conducted by each commercial gear type. This provision shall not limit the ability of tribes to promulgate emergency regulations, in accordance with

prior orders of this court, for fisheries managed by the International Pacific Salmon Fisheries Commission.

Subject to the provisions of other applicable orders of this court, the "Order Re: Rules of Procedure of Fisheries Advisory Board and Resolutions of Disputes," dated December 17, 1976, shall be and hereby is modified to permit the State of Washington to enact emergency closures of treaty right fishing for conservation purposes within twenty-four (24) hours, in cases where the tribal parties have not provided the state at least sixty (60) hours notice of the tribal emergency opening required by this order.

10. Submission of Regional Management Plans - Prior to June 1, 1978, all treaty tribes shall, separately or in common with other affected tribes, submit comprehensive management plans for the portions of Puget Sound waters in which their tribal fisheries are conducted. The goal of these plans shall be to achieve coordination between all affected tribes and to eliminate potential conflicts in management strategy. These regional plans of the tribes shall specifically address the provisions of this plan as to viable stocks, escapement goals for both natural and hatchery production, methods of in-season run size estimation, harvest rates and intertribal sharing, and other matters as required by this Order.

11. Resolution of Disputes

11.1 Disputes regarding failure to reach agreements, or to take, or to refrain from taking, any action required under this agreement shall be resolved as provided in the Order Re: Rules of Procedure for Fisheries Advisory Board and Resolution of Disputes, dated December 17, 1976, United States v. Washington, (W.D. Wash. No. 9213), except that no party may object to the jurisdiction of the Board as to matters addressed by this Plan. In addition, the parties shall choose a technical advisory committee or committees, which shall develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size

for all species of fish, ocean catches, escapement goals, catches and adjustments, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the fishery management entities to assure that the commitments in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems in Puget Sound. The Committee shall be comprised of an equal number of representatives named by the State of Washington and the Indian Tribes, respectively.

11.2 This Plan shall in no way affect or be considered by any person, party, or court to affect the continuing jurisdiction of the United States District Court for the Western District of Washington over all issues and matters within the jurisdiction of that Court pursuant to the ruling in United States v. Washington, No. 9213.

11.2.1 This Plan shall in no way be considered to change Final Decision #1 of the United States District Court for the Western District of Washington in United States v. Washington, No. 9213, with regard to sharing principles, usual and accustomed fishing places, treaty rights, the self-regulating status of Indian Tribes, the off-reservation jurisdiction of Indian tribal governments, the obligations of the State of Washington, the special status of on-reservation fisheries, or any other matter.

The foregoing plan is hereby adopted by the court this 31st day of August, 1977.

/s/
George H. Boldt
Senior, United States
District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, v. STATE OF WASHINGTON, et al, Defendants	)	CIVIL NO. 9213 PRELIMINARY INJUNCTION RE: ENFORCEMENT OF 1977 FISHERIES

Upon the motion of the United States, the affidavits in the record, the testimony of witnesses, together with the records and files of this case, the Court finds that the State of Washington remains unwilling or unable to control the non-treaty fishermen so as to be in compliance with the orders of this Court by providing treaty Indians with the opportunity to catch their share of the returning salmon.

The Court further finds that this situation, if permitted to continue, will lead to a breakdown of law and order in the case area, the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource.

Therefore, it is hereby ORDERED that:

1. All Puget Sound and other marine waters easterly of Donilla Point-Tatoosh line and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor and its watersheds are hereby closed to all net salmon fishing except during such times and such specific waters as are opened by State or tribal regulations or regulations of the United States conforming to the orders of this Court in this case.

All reef net, gill net and purse seine fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in the waters described in paragraph 1, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, the Grays Harbor Gillnetters Association and all persons in active concert or participation with

them are hereby enjoined and prohibited from engaging in taking, possessing, or selling salmon of any species taken from such waters, unless such person has first ascertained from the Washington Department of Fisheries telephone "hot-line", 1-800-562-5672 or 1-800-562-5673, that the area to be fished is open for fishing by non-treaty fishermen at the time the individual intends to fish, provided, that this provision shall not apply to persons exercising treaty fishing rights in accordance with the orders of this Court.

3. The defendant State of Washington is directed to maintain a continuous telephone hot-line service free of charge to any caller from within the State of Washington to provide information on areas within the waters described in paragraph 1 of this order that are open to net salmon fishing by non-treaty fishermen in conformity with the orders of this Court. The defendant shall furnish to this Court and to the United States Attorney a transcript of the daily hot-line messages.

4. The defendant State of Washington is ordered and enjoined to commence immediately to serve by certified mail return receipt requested or otherwise copies of this preliminary injunction on all state-licensed commercial salmon net fishermen, and any other person found to be engaged in net fishing for salmon or assisting in such fishing, and to furnish the Court with proof of service or written statement of the reason for the inability to serve any particular licensee. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal's Service, and such other agencies as may be appropriate, may serve copies of the preliminary injunction on all such persons.

5. Defendant State of Washington is ordered and the United States is directed to cite any fishermen who, having received notice of this order, thereafter engages in fishing or assisting with fishing in violation of the provisions of this order to appear before the

United States District Court to be ordered to show cause why he should not be held in contempt.

6. The issuance of a Preliminary Injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members and to the salmon resource.

7. The issuance of a Preliminary Injunction is necessary in aid of this Court's jurisdiction and to protect and effectuate this Court's prior judgments.

This Preliminary Injunction shall remain in effect until further order of this Court.

IT IS HEREBY SO ORDERED this 27th day of September, 1977.

/s/
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINTON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	)	NO. 9213 ORDER FOR SERVICE OF NOTICES REGARDING 1978 ENFORCEMENT HEARING

Based upon the motion of the United States, the arguments of counsel, and the records and files of this case, the Court finds that it is necessary to hold a hearing to determine whether or not to enter a preliminary or permanent injunction against non-treaty fishermen for 1978 and subsequent seasons; and the Court finds that it is appropriate that the fishermen against whom the United States seeks the injunction should receive notice of such hearing; and the Court further finds that the most expeditious means to accomplish notice to this large group of fishermen is by sending them notices of the hearing, together with a copy of the proposed order, with the applications for renewal of their fishing licenses for the 1978 season.

THEREFORE, IT IS ORDERED:

1. The defendant State of Washington is ordered not to mail out or in any other manner distribute, any applications for renewal, transfer, or issuance, of a net salmon fishing license without attaching to such application a copy of a notice, approved by this Court, which advises all persons requesting licenses of the time and place for a hearing on the motion of the United States for a preliminary or permanent injunction concerning 1978 and subsequent seasons, and a copy of the proposed injunction.

2. The defendant State of Washington is ordered not to issue any net salmon fishing licenses for 1978 and/or subsequent seasons without further order of this Court.

3. The hearing on the motion of the United States shall be set for the 23rd day of January, 1977, at 9:30 a.m. o'clock. Any individual or organization that is not a party to this case that wishes to appear at that hearing must file a written notice of appearance, stating whether such appearance will be in person or by attorney, together with a memorandum setting forth that person or organization's position with regard to the proposed order, and specifically setting forth any objections to the order, the reasons for those objections, and the legal authorities relied upon for such objections. Such notices and memoranda must be filed no less that ten days before the hearing.

The entry of this order is necessary in order to protect the continuing jurisdiction of this Court over the allocation of the salmon harvest in the case area.

DATED this 7th day of December, 1977.

/s/ George H. Boldt
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ J. Ronald Sim
J. RONALD SIM
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE AND SWINOMISH INDIAN TRIBAL COMMUNITY, Intervenors-Appellees, v. STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, its Director, Defendants-Appellants.	)	Nos. 75-2835 76-1042 OPINION

Appeal from the United States District Court for the Western District of Washington

Before: CHAMBERS and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

KENNEDY, Circuit Judge:

In the continuing litigation to implement and enforce the decrees we affirmed in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), the district court issued certain injunctions against the State of Washington to enforce an allocation of fishing rights between treaty Indians and other fishermen during the 1975 salmon fishing season. The State of Washington challenges the injunctions on this appeal. We have determined the appeals should be dismissed as moot.

---

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The first injunctive order in question directed the State of Washington and its Department of Fisheries to adopt certain regulations to implement and enforce directives of the 1975 International Pacific Salmon Fisheries Commission ("IPSFC" or "Commission") pertaining to sockeye and pink salmon fishing in United States waters.[1] Since the Commission promulgates fishing regulations on a yearly basis, the 1975 Commission directives are now fully superseded by other Commission orders. If there were a likelihood that the district court would require the state to implement Commission regulations for subsequent seasons, the legal questions presented here might be ones "capable of repteition, yet evading review," and thus amenable to adjudication notwithstanding their moot character in this case. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911); see Roe v. Wade. 410 U.S. 113, 125 (1973). That, however, is not the position here.

After the 1975 season, it became unnecessary to utilize state regulations to accommodate the Commission directives and the court decree. The United States has taken steps to remove treaty Indians from the jurisdiction of the Commission and regulates treaty Indian fishing solely through the Bureau of Indian Affairs. The Commission regulations are enforced against nontreaty fishermen by the National Oceanic and Atmospheric Administration through its subagency the National Marine Fisheries Service and by the United States Coast Guard. The 1975 injunction which required the state to adopt regulations is not, therefore, likely to be reissued for later years.

Appellant argues that, even if repetition of this injunction is unlikely, two of the legal premises relied on by the district court are of continuing importance in this litigation and should be addressed here. These questions are whether or not the Washington Department of Fisheries is required to adopt and enforce fishing regulations in a manner designed to give treaty Indians the opportunity to catch fifty percent

of the avbailable fish, and whether this court's holding in United States v. Washington, supra, dictates that any fifty percent allocation must apply to waters under the jurisdiction of the IPSFC. Questions regarding the nature and extent of the rights of treaty Indians to an allocation of the pink and sockeye salmon in IPSFC waters should not be discussed in a hypothetical context. Furthermore, the question of a percentage allocation is presented in United States v. Washington, __ F.2d ___ (9th Cir. 1978) (Nos. 77-3654 & 77-3655, filed April __, 1978). These are not issues that threaten to elude review. Therefore we follow the rule that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); see DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

The district court issued a second injunction directed to the Superior Court of the State of Wshington in and for the County of Thurston. The federal injunction ordered a stay of state court orders requiring the Washington Department of Fisheries to suspend fishing regulations then in effect for the 1975 season. The 1975 season has now passed and neither the order of the United States district court nor that of the state court has current force. Moreover, the situation that gave rise to the federal injunction is unlikely to recur since, as noted above, state agencies are no longer relied upon to allocate fishing rights in the fisheries controlled by the IPSFC as between treaty Indians and others. The issues presented by the order enjoining the state proceedings are now moot.

Thirdly, the district court issued a preliminary injunction to prevent the state from enforcing state regulations which restricted certain types of net fishing by the Swinomish tribe. The purpose of the state regulation was to give effect to IPSFC directives. This injunction has no practical consequence for the parties now. It is not likely to be reissued. The responsibility for enforcement of IPSFC regulations

has now been assumed solely by federal authorities, and we think the appeal from this order is also moot.

It must be quite apparent that the case tendered for our decision here would require us to address procedural questions that touch upon fundamental principles controlling the delicate balance of state and federal power. Beyond those questions we would further be required to interpret substantive rights of the parties under United States v. Washington that are of great significance to the fishing industry in the Northwest. We would not serve the vital interests of the parties by addressing such questions in a hypothetical case while other, pending cases present the issues in an active context.

We dismiss this appeal as moot.

APPENDIX K

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Washington, D.C. 20235

Honorable John E. (Jack) Cunningham
House of Representatives
Washington, D.C. 20515

Dear Mr. Cunningham:

This is in response to your letter of May 15, 1978, with the enclosed correspondence from Mr. Sutherland concerning the International Pacific Salmon Fisheries Commission (IPSFC) regulations.

Mr. Sutherland indicates that the United States Government is acting illegally by implementing the U.S. v. Washington decision, otherwise referred to as the Boldt decision, outside the Commission regulations in 1978. We cannot agree with Mr. Sutherland's contention. Under U.S. v. Washington, the Executive Branch is required to adopt strategies which will accomplish the intent of the decision, consistent with U.S. international obligations under the U.S.-Canada Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fishery of the Fraser River System, under which the IPSFC is established. Within this framework, it has been U.S. policy in the Convention area fishery to effectuate treaty Indian fishing rights, to the maximum extent feasible, in accordance with the U.S. v. Washington decision.

The Convention does not address the domestic measures which either country may wish to pursue in order to effect an allocation among user groups of the country's share of the harvest in the Convention area, so long as any such measures do not prevent the Commission from accomplishing the Convention's objectives. Those objectives are an equal division of the catch between the United States and Canada, and proper

escapement of fish for spawning. The United States has thus sought to achieve a regulatory program through the International Pacific Salmon Fisheries Commission with sufficient flexibility to achieve Convention objectives and to assure that our domestic allocation measures will be effective.

Regulations governing the IPSFC fishery in 1978 have now been approved by both Governments, with the understanding that the United States will meet its treaty Indian obligations in a manner similar to the approach used during the 1977 fishing season.

I hope the above information will assist you in responding to Mr. Sutherland's inquiry.

Sincerely,

/s/

Terry L. Leitzell
Assistant Administrator for Fisheries

Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

No. 78-139

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

STATE OF WASHINGTON, et al.,
Petitioners.

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Petitioners

Office and Post Office Address:
316 North Third Street
P. O. Box 487
Yakima, Washington 98907
(509) 575-1500

No. 78-139

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

STATE OF WASHINGTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Petitioners

Office and Post Office Address:
316 North Third Street
P. O. Box 487
Yakima, Washington 98907
(509) 575-1500

INDEX

Page

QUESTIONS PRESENTED 1

CONSTITUTION AND TREATY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 9

CONCLUSION 14

TABLE OF AUTHORITIES

Table of Cases

Bryant vs. Ohio, 362 U.S. 906 (1960) 14

Columbia River Fishermens' Protective Union Inc. et al. vs United States District Court for the District of Oregon 573 F2d 1123 (9th Cir 1978) 3

Commissioner vs. Sunnen, 333 U.S. 591, 597 (1948) 5

Hutto vs. Finney, ... U.S. ... 46 L. Week 4817, 4819 (June, 1978) 13

Hecht Company vs. Bowles, 321, 329 (1944) 13

Maryland vs. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) 14

Milliken vs. Bradley, 433 U.S. 267, 280 (1977) 13

Missouri vs. Holland, 252 U.S. 416 (1920) 11

Puget Sound Gillnetters vs. Moos, 88 Wn 2d, 677 565 P2d 1151 (1977) 9, 12

Seufert Brothers Company vs. United States, 249 U.S. 194 (1919) 4

Washington State Commercial Passenger Fishing Vessel Association vs. Tollefson, 87 Wn 2d 417, 553 p 2d 113 (1976) 9, 12

Swann vs. Charlotte - Mecklenburg Board of Education, 402, U.S. 1, 16 (1971) 13

Page

Tulee vs. State of Washington, 315 U.S. 81 (1942) 4

United States vs. Johnson, 319 U.S. 302 (1942) 12

United States vs. Oregon, 302 F. supp 899 (D. Ore 1969) Subsequent orders aff'd 529 F 2d 570 (9th Cir 1976), 573 F2d 1123 (9th Cir 1978) 4, 5, 6

United States vs. Taylor, 3 Washington Territorial Reports 88 (1887) 4

United States vs. Washington, 384 F. Supp 312 (W.D. Wash 1974), aff'd 520 F 2d 676 (9th Cir 1975) *cert. denied.* 423 U.S. 1086 (1976). Subsequent Orders affirmed 573 F2d 1117, 1119, 1121, 1123 (9th Cir 1978) 4, 5

United States vs. Winans, 198 U.S. 371 (1905) 4

CONSTITUTIONAL PROVISIONS

Article III, §1 ..... 2, 11

Article III, §2 ..... 2, 11

Article IV, Paragraph 2 ..... 2, 11

Article X 11

TREATY PROVISIONS

Treaty with the Yakimas, 12 Stat. 951 Article III 2, 3

MISCELLANEOUS

Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp 191-258 9

No. 78-139
IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

STATE OF WASHINGTON, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

I.

QUESTION PRESENTED

Power of federal courts to protect treaty reserved rights and a national resource involving anadromous fish, where the action or inaction of a state and its citizens is adverse to both federal interests.

II.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

A. **Constitutional Provisions:**

1. Article VI, Paragraph 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish***."

3. Article 3, Section 2:

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority;***"

B. **Treaty with the Yakimas** (12 Stat. 951):

1. Article III, paragraph 2:

"The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory***"

III.

STATEMENT OF THE CASE

Respondent, Yakima Indian Nation, objects to the petitioner's statement of the case, in that it omits certain pertinent facts essential to a full and complete statement; without which, petitioner's statement is strongly biased in petitioner's favor.

Full and accurate statements require discussion of an included companion case, wherein almost identical injunctive relief for which petitioner seeks review, was affirmed in the relevent decision of April 24, 1978 by the Court of Appeals for the Ninth Circuit. This now *res judicata* relief was granted by the Federal Court for the District of Oregon in *Columbia River Fishermens' Protective Union, Inc., et al.,* vs. *United States District Court for the District of Oregon,* 573 F2d 1123 (1978). (See Washington Petition Appendix A.) Likewise, full and accurate statements require the recitation of court recorded history of the treaty reserved fishing rights of the Yakima Indian Nation, a party to both rulings.

This Court, as well as other federal courts, has found it necessary to restrict state and non-Indian intrusions on the treaty fishing rights reserved by the Yakima Indian Nation in Article III of the *Treaty with the Yakimas* (12 Stat. 951).

The first case interpreting the Yakima Nation's

reserved fishing rights was *United States vs. Taylor*,[1] in which the Washington Territorial Supreme Court held that the Yakima Nation's reserved fishing rights encompassed the right to enjoy fishing to the same extent as they had at treaty time. Though this determination was made early on,[2] this was not the end of attempts to infringe upon the Yakima Nation's treaty reserved fishing rights. This Court by plenary action found it necessary to protect this particular treaty right reserved by the Yakima Nation in no less than three cases. *United States vs. Winans*, 198 U.S. 371 (1905); *Seufert Brothers Company vs. United States*, 249 U.S. 194 (1919) and *Tulee vs. State of Washington*, 315 U.S. 681 (1942).

Notwithstanding continued rejection of state and non-Indian claims (that petitioner again repeat), it has become necessary again in the last decade that immediate and continuing relief be sought from federal courts to protect the treaty reserved fishing rights of the Yakima Nation. Reserved fishing rights that needed protection were located, among other places on the Columbia River and on the Puget Sound. The Columbia River traverses the State of Washington and

[1] 3 Washington Territory Reports 88 (1887).

[2] 1887. The Yakima Treaty was ratified in 1859. Washington did not join the Union until 1889. It was established below in *United States vs. Washington* and *United States vs. Oregon*, infra, that at treaty times the Yakima Nation landed many more fish in numbers and percentage of the catch than their present share of the current landings.

in parts serves as the border between the State of Oregon and Washington. The Puget Sound is contained within the State of Washington and the border between the United States and Canada traverses the upper portions of Puget Sound.

In 1969, a decision filed by the Federal District Court for the District of Oregon in *United States vs. Oregon*,[3] reaffirmed the reserved fishing rights of the Yakima Nation in the Columbia River. Subsequently, in 1974, a decision of the Federal District Court for the Western District of Washington, in *United States vs. Washington*[4] established the reserved fishing rights of the Yakima Nation in Puget Sound waters. Both district courts retained jurisdiction for the purpose of enforcing its judgments and injunctive relief.[5] Though Washington was not an original party in the case affecting the treaty reserved rights on the Columbia, it was granted the right to intervene in *U.S. vs.*

[3] 302 F. Supp 899 (D. Ore 1969); *subsequent order* (providing for 50% share of Columbia River run for treaty reserved fishing) *affirmed*, 529 F 2d 570 (9th Cir. 1976). *Subsequent order aff'd* upholding enforcement orders under this decree like those petitioner wishes reviewed by the Ninth Circuit. 573 F 2d 1123, (9th Cir. 1978). Petition for certiorari not filed.

Washington is herein collaterally estopped from objecting to the litigated quantification of the treaty reserved fishing rights of Yakima Nation and court enforcement of that reserved right. *Commissioner vs. Sunnen*, 333 U.S. 591, 597 (1948).

[4] 384 F. Supp 312 (W.D. Wash. 1974), *aff'd*, 520 F2d 676 (9th Cir. 1975), *cert denied*, 423 U. S. 1086 (1976) *subsequent orders aff'd*, 573 F. 2d 1117, 1119, 1121, 1123 (9th Cir 1978).

[5] The district courts exhibited necessary foresight in retaining jurisdiction. Unfortunately, it has been necessary to continually enjoin breaches by the States of Oregon and Washington of the district courts decisions and orders.

Oregon, supra and during the times important to this discussion have been a party to that case.[6] Since their original decisions, both district courts have exercised their retained jurisdiction to protect the established treaty reserved fishing rights of the Yakima Nation and other Indian tribes. From the outset of the intervention of Washington in the Columbia River case and from the very announcement of the decision in the Puget Sound case, it became evident that Washington and its fishermen were going to attempt to frustrate the holdings of the two district courts and their later affirmance by the Court of Appeals for the Ninth Circuit. The Court of Appeals for the Ninth Circuit in the decision for which petitioners seek partial review took note of these "extraordinary machinations" in resisting the decree, observing that except for some of the desegregation cases, "the District Court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."

While these "extraordinary machinations" were reaching their culmination in non-Indian resource destructive fishing, the State of Oregon and Indian tribes on the Columbia River were attempting to preserve the fishery on the Columbia through the vehicle of a

[6] Washington was a party during the affirmation of subsequent orders by the Court of Appeals for the Ninth Circuit. (529 F 2d 570, (1976); 573 F 2d, 1123 (1978) from which no review has been sought.

joint management plan. This plan was finally made possible by the Columbia River tribes agreeing for a period of five years to forego exercising some of their established treaty reserved fishing rights. In February of 1978, the management plan was signed by the Columbia River tribes, the State of Oregon, the State of Washington, and the United States. This approved plan was adopted by the federal court by an agreed order with all parties including petitioner Washington and respondent, agreeing thereto. Thereafter, Washington's fish management agencies and the Washington judiciary claimed that Washington had no authority to agree to the plan and therefore could not fulfill its obligation to regulate non-Indian fishermen under the agreed plan. Washington did not move to amend the plan or the resulting agreed order, but attempted to hold the Indian tribes to their obligations under the plan, while claiming that Washington courts would not allow them to fulfill their obligation under the plan. Based on this lack of authority, Washington frustrated the plan and illegal, wasteful fishing resulted on the Columbia so that the Indians were unable to land their reduced share under the approved plan without seriously jeopardizing the necessary escapement. This resulted in the Indians obtaining, even with the district court's necessary assistance, (which was affirmed by the Ninth Circuit Court of Appeals) considerably less

than the share of the harvest agreed to by Washington and Oregon. It was only through the actions of the Federal Court for the District of Oregon, which parallel the actions that petitioners wish to have reviewed, that non-Indian fishermen were restrained from illegally taking even a larger amount of the established treaty reserved share guaranteed by the agreed management plan.

Though the petitioners do not and can not contend that federal court action to prevent intrusions on the treaty reserved fishing rights and national resource in the Columbia River is improper; they do make this contention, as regards the same rights of the Yakimas and the same national resource, in the Puget Sound case area. The record in the Puget Sound case area, is just as clear, that absent action of the federal courts, intrusion on treaty reserved fishing rights and damage to runs of anadromous fish will result.

Other respondents have more completely detailed the intrusions on the Yakima Nation's treaty reserved rights and the danger to the resource. However, it is clear from any review of the factual situation or claims of the petitioners, that the State of Washington is unable or unwilling to act according to the federally determined law of this land to protect either determined treaty reserved rights or runs of anadromous fish. Petitioner's contention, both in media and judicial

forums, is that the federal courts in their recognition of a treaty reserved right in the fisheries are totally wrong and the only acceptable solution is that the federal courts reverse their recognition of this reserved right and repose control of this fishery in the State of Washington which will not make any allocation for treaty reserved rights.

IV

ARGUMENT

This Court must not, through the granting of writs of certiorari, support petitioner's acts of *nullification*.[7] Quite clearly, petitioners in this and other petitions, including the contrived petition in *State of Washington vs. Washington State Commercial Passenger Fishing Vessel Association*, 77-983[8] and the petitions in *State of Washington vs. United States*, 78-119 and *Puget Sound Gillnetters vs. U.S. District Court for Western Washington*, 78-139; are primarily seeking to overturn a fully adjudicated determination of treaty reserved fishing rights. Respondent acknowledges that petitioner presents the question of district court enforcement of a fully adjudicated decree, but this clearly is

---

[7] Washington and its allies, present actions are so similar to the actions of the Southern States in the first half of the nineteen century; that "nullification" is clearly the word to be used. See: Hendrick, *Bulwark of the Republic*, "The Rise and Fall of Nullification", pp 191-258.

At this early time, "nullification" was defined as: "nullification, anarchy reduced to a system" (p. 255). We adopt that definition.

[8] *Puget Sound Gillnetters vs. Moos*, 88 Wn. 2d 677, 565 p2d 1151 (1977) is included in 77-983.

an attempted door opener to contest the fully adjudicated determination of involved treaty reserved rights.[9] The State of Washington, through concerted executive, legislative and judicial action, in concert with its allies, has followed a course of action that has as its acknowledged purpose the destruction of fully adjudicated treaty reserved rights. If this court wishes to bestow awards for judicial gamemanship, it could not do better than to grant the petitions in 77-983, 78-119 and 78-139.

However, the granting of the petitions will have the practical effect of forestalling a resolution of the controversy in the Puget Sound case area similar to the one that exists in the Columbia River case area. Likewise, if the petitions are granted, it must be acknowledged that the State of Oregon would be politically forced to follow Washington's now successful path of fostering controversy.

Further, there can be no doubt that if this court grants certiorari that the continuing state sponsored

---

[9] There may be those who would favor Supreme Court Review of the underlying adjudication of the treaty reserved fishing rights in an attempt to obtain Washington's compliance with the declared law of the land. Tempting as this may be, Respondent is not a member of that school. Experience has taught Respondent that appellate court affirmance has not dissapated the venom directed against the District Court or in any way assured compliance with the District Court's orders. Likewise, there is no indication in Washington's briefs, that there has been acceptance—in other than a most limited way—of this Court's past rulings involving the Yakima Treaty. Finally, and most important; the underlying adjudication is *re judicata*. It should not be raised at this time.

controversy will result in continued illegal fishing during the pendency of this court's plenary determination. Encouragement of this rebellion with its disasterous effects on the lower courts, the fishery and fully adjudicated treaty fishing rights, is undoubtedly of great concern to this court.

Washington's executive and judiciary throwing down the gauntlet in the federal area of *treaty rights* is unprecedented for over one hundred years. As this court has reminded us in *Missouri v. Holland*, 252 U.S. 416 (1920), a treaty made by the President with the required concurrence of two thirds of the Senate is, under the supremacy Clause of Article VI § 2, part of "the supreme Law of the land" which takes precedence over contrary state law.

Article III of the *Constitution* makes it just as clear that "*all* cases" "arising under treaties" are within the judicial power of the United States which is vested in the "Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Petitioner's reliance on Article X to excuse this conflict is inapposite. Article X must give way to Article VI and Article III, which, with absolute clarity and without exception, gives the right of way to the national authority. *Missouri v. Holland, supra.*

Washington, with its allies' assistance, having interjected itself into the national right of way in the

vehicle of the cases of *Puget Sound Gillnetters, supra,* and *Washington State Commercial Passenger Fishing Vessel Association, supra,* (pending in 77-983), now seek to use this feigned vehicle to supply a collision as a basis for a writ. This feigned vehicle does not supply the necessary conflict. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated — a safeguard essential to the integrity of the judicial process, and one held by this Court to be indispensable to the adjudication of questions by this Court. *United States vs. Johnson,* 319 U.S. 302 (1942).

Washington, and its allies, seek to invade the national right of way only for the purpose of collision and to make the national right of way rough. Washington and its allies readily agree that they are unable to take any action to preserve the national interests. The record is clear that this inability is joined with their unwillingness. The efforts of the United States Court for the Western District of Washington affirmed by the Court of Appeals for the Ninth Circuit are necessary efforts to smooth the state inspired rough spots in the national right of way.

Any lesser efforts would be an abdication of the national purpose so explicitly contained in the Constitution. This Court has made it clear that the lower courts have a duty to fashion such a remedy to correct a systematic invasion of this national right of way.

Milliken v. Bradley, 433 U.S. 267, 280 (1977); *Swann v. Charlotte - Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *Hecht Company vs. Bowles,* 321 U.S. 321, 329 (1944); *Hutto v. Finney,* ..... U.S. ..... 46 L. Week 4817, 4819 (June, 1978).

The actions of Washington, and its allies, have presented this court with a very serious problem. No matter what action this court takes in granting or denying certiorari, the announcement of the decision will support the continuing dedicated resistance to the announced law of the land. If certiorari is granted, as officials in Washington have promised the non-Indian fishermen, we can expect only totally uncontrollable, illegal fishing in the Puget Sound area and moves to force Oregon to pursue the same course in the Columbia River area. This action can seriously jeopardize not only the adjudicated reserved rights of the treaty fishermen, but the resource as well. While the danger to the adjudicated reserved rights and the total resource will be lessened by the denial of certiorari on all petitions, the unanswered rulings of the State will pose a problem. This is an extraordinary case and one that calls for this court to pursue extra-ordinary methods in announcing its decision on certiorari. Respondent is fully cognizant of the pressures that generally prohibits this Court from explaining its granting or denial of certiorari. However, this case would seem

to call for an opinion accompanying the court's ruling in 77-983 such as this Court has deemed necessary in cases like *Bryant vs. Ohio,* 362 U.S. 906 (1960) and *Maryland vs. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

CONCLUSION

For the above reasons, writs of certiorari should not issue in 77-983, 78-119 and 78-139. Denial of writ in feigned 77-983 should be explained.

Respectfully submitted,

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Respondent,
Yakima Indian Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 1978, three copies of this brief in opposition were mailed in a United States mailbox, first class postage prepaid, to Slade Gorton, Edward B. Mackie, James M. Johnson, Counsel for State of Washington, Temple of Justice, Olympia, Washington 98504; to Charles T. Yates, Moriarty, Long, Counsel for Puget Sound Gillnetters Association, Mikkelborg & Broz, 330 Seattle First National Bank Building, Seattle, Washington 98154, and to Joseph T. Mijich, John P. World, Counsel for Purse Seine Vessel Owners Association, 3920 Bank

of California Center, Seattle, Washington 98164. I further certify that all parties required to be served have been served.

JAMES B. HOVIS
of Hovis, Cockrill & Roy
Counsel for Respondent Yakima Nation and Member of The Bar of this Court.

DISTRIBUTED
OCT 2

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1978
NO. 78-139

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

and

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION AND PURSE SEINE VESSEL OWNERS ASSOCIATION

Office & P.O. Address:
3920 Bank of California Center
Seattle, WA 98164

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Purse Seine Vessel Owners Association

3300 Seattle-First National Bank Bldg.
Seattle, WA 98154

CHARLES E. YATES
MORIARTY, LONG, MIKKELBORG & BROZ
Attorneys for Puget Sound Gillnetters Association

CRAFTSMAN PRESS II WORD PROCESSING, SEATTLE

TABLE OF CONTENTS

Page

Argument In Reply. 1

1. Issues Have Not Previously Been Settled 1

2. Neither the Doctrine of "Res Judicata" nor "Law of the Case" Would Appear to Prevent This Court From Reviewing the Treaties 9

A. Res judicata. 9

B. Law of the case 11

Conclusion 13

TABLES OF AUTHORITY

Tables of Cases

Antoine v. Washington, 420 U.S. 194 (1975). 7

Burnet v. J. Rogers Flannery & Co., 286 U.S. 524 (1932) 11

Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II). 5,7

Falk v. Brennan, 414 U.S. 190 (1973) 12

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251 (1915) 12

Hughes Tool Co. v. TWA, 409 U.S. 363 n. 1 (1973). 11,12

Mercer v. Theriot, 377 U.S. 152 (1964) 11

Messinger v. Anderson, 225 U.S. 436 (1912) . . .11

Panama R.R. v. Napier Shipping Co., 166 U.S. 282 (1897) 11

Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977) 12

Porter Co. v. NLRB, 397 U.S.99 (1970) 12

Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (Puyallup III). 6,7

Reece v. Georgia, 350 U.S. 85 (1955) 11,12

Riley v. Phillips Petroleum Co., 427 F.2d 19 (10th Cir. 1970) 10

Scott v. United States, 46 U.S.L.W. 4433 (U.S. May 15, 1978) 12

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) 11

White v. Higgins, 116 F.2d 312 (1st Cir. (1940). 11,12

Zdanok v. Glidden Co., 327 F.2d 944 n. 9 (2d Cir. 1940) 11

Textbooks

1B J. Moore, Federal Practice, ¶ 0.404 (2d Ed. 1975) 12

9 J. Moore, Federal Practice ¶ 110.25[2] (2d Ed. 1975) 12

Other Authority

Fed. R. Civ. P. (8)(c) 9

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978
NO. 78-139

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

and

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION AND PURSE SEINE VESSEL OWNERS ASSOCIATION

ARGUMENT IN REPLY

1. Issues Have Not Previously Been Settled

Although the United States urges this Court to review the issues raised in the cases below, with

which we agree, the United States nonetheless suggests that those issues have been "long since settled" (U.S. Br., p. 19). With this latter suggestion, we disagree; these issues have never been settled by this Court.

The United States correctly states the central issue (U.S. Br., p. 21):

> The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the "right of taking fish at all usual and accustomed grounds and stations. . . . in common with" other Washington citizens (Pet. App. A-131).

Judge Boldt has construed this right to fish "in common with" other citizens to mean that off the reservation at their usual and accustomed fishing grounds, which the Judge has found to include virtually every body of water in Washington state except some small lakes, any number of Indians may take all the harvestable fish they want for ceremonial and subsistence purposes, which can be a substantial number,[1] plus fifty per cent of the

---

[1] In the 1978 fishing season, treaty Indians were authorized to harvest for ceremonial and subsistence purposes 52,149 chinook, coho and chum salmon out of 1,531,000 harvestable salmon (includes treaty Indian "on reservation" harvest). In Final Decision No. 1, Judge Boldt made it clear that the tribes, themselves, shall make the sole determination of "the number or quantity of fish they intend and expect to take at their usual and accustomed fishing grounds for traditional ceremonial needs and for consumption by tribal members and their families." 384 F. Supp. at 417.

rest. This Court has never construed the treaties to require such an allocation to Indians as a matter of law in every case. Such a construction would permit one remaining treaty Indian fisherman of his tribe to take all the fish he wants on the reservation (none of which need be considered for ceremonial or subsistence purposes), then go to his usual and accustomed fishing grounds off the reservation and take all the fish he wants for ceremonial and subsistence purposes, and then take fifty per cent of the rest; notwithstanding that there may be thousands of non-treaty fishermen relegated to harvest less than fifty per cent. It is a far-reaching and unprecedented construction of the phrase "in common with," which would entitle one Indian to a greater number of fish than the

total available to thousands of non-treaty fishermen combined. Yet the United States contends (U.S. Br., p. 21) that this interpretation is "an appropriate culmination of the unbroken line of decisions by this Court" cited in its brief. Let us examine those decisions.

In United States v. Winans, 198 U.S. 371 (1905), having acknowledged that the state could regulate the Indian's treaty right to fish, this Court held that such Indian could, however, cross private property to reach his usual and accustomed fishing grounds.

Next, in Tulee v. Washington, 315 U.S. 681 (1942), having again acknowledged that the state could regulate the time and manner of treaty Indian fishing for conservation purposes, this Court held that a treaty Indian, however, could not be compelled to buy a fishing license to fish at his usual and accustomed fishing grounds.

Next, in Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (Puyallup I), this Court held that the state's conservation regulations at an

Indian's usual and accustomed fishing grounds must meet appropriate standards and cannot discriminate against the Indian; however, the Court asserted (p. 403) that ". . . any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'. . . ."

But, notwithstanding that the treaties secured to the Indians the right to cross private property to reach their fishing grounds and to fish without a license and not be discriminated against, this Court has never held that the treaties entitle all Indians to a specific allocation of fish as a matter of law. In Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), this Court implicitly rejected any such specific allocation of fish by stating (p. 49):

> What formula should be employed is not for us to propose. There are many variables--the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used.

Judge Boldt took none of the foregoing factors into consideration when he held that, as a matter of law in every case, the treaty Indian was entitled to take more than fifty per cent of the harvestable fish (including ceremonial and subsistence fish). the Court of Appeals didn't even think the number of treaty fishermen was relevant; in the case at issue, it stated (p. 1128):

> Comparison between the number of treaty and non-treaty fishers, or the quantity of fish each category has an opportunity to take, are simply irrelevant under the law.

In the recent case of Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (Puyallup III), this Court (i) rejected the Indians' claim to an exclusive right to take steelhead passing through their reservation, (ii) recognized that both treaty Indians and non-Indian citizens had fishing rights under the treaty to be shared in common, and (iii) affirmed the state court's allocation (pursuant to

the above quoted formula in Puyallup II of the 1975 natural (non-hatchery)[2] steelhead run to the Indians.[3]

In Antoine v. Washington, 420 U.S. 194 (1975), consistent with prior decisions, this Court held that Indian hunting rights on a portion of Indian reservation ceded to the United States were subject to state conservation regulations, but that such regulations must have "appropriate safeguards" and must not discriminate against the Indian.

---

[2] Whether hatchery fish should always be excluded from the treaty right was not decided.

[3] Under Washington state law steelhead are a game (non-commercial) fish which can be taken only by hook and line. Since Indians traditionally fish only with nets, an accomodation was necessary in the Puyallup I, II and III cases to permit Indians to fish for steelhead with nets "in common with" non-Indians fishing with hook and line. The Boldt decision, however, deals mainly with salmon, which are taken commercially by net; therefore, a similar accomodation with a corresponding appropriate allocation for salmon runs each year would not necessarily be required in the cases at issue here in order to meet the "in common with" requirements. Another distinguishing feature in Puyallup III is that the Court was dealing with an alleged "on reservation" fishery.

There was, however, no holding that Indians were entitled to a specific allocation of game.

Article III of the Yakima Treaty, which reserves to the Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," also secures to them in the previous sentence "the right, in common with citizens of the United States, to travel upon all public highways." To be consistent, Judge Boldt's construction of "in common with" would entitle the Indians to more than fifty per cent of the use of all public highways and one Indian could theoretically block off at least half of any public highway in Washington state for his personal use. How can such a construction be allowed to stand, let alone be considered "long since settled."

There simply is no case where this Court has ever established an allocation rule such as the one established by Judge Boldt. We, therefore, urge this Court to review this issue along with all the corollary issues raised by the decisions below.

2. Neither the Doctrine of "Res Judicata" nor "Law of the Case" Would Appear to Prevent This Court From Reviewing the Treaties

We agree with the United States (U.S. Br., p. 22, n. 17) that "neither the doctrine of res judicata nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case."

A. Res judicata

Res judicata is a defense which must be affirmatively pleaded in the trial court, or else it is waived. See Fed. R. Civ. P. (8)(c). Here no party invoked res judicata when we challenged the district court's interpretation of the treaties or when the state challenged the expansion of Judge Boldt's orders. And given the Court of Appeals' extended treatment of the issue on the merits, that court can certainly not be said to have disposed of the treaty interpretation argument on res judicata grounds.

In addition, there is not a "final" judgment in this litigation that could have res judicata

effect. In United States v. Washington, the court of appeals ordered the case remanded to the district court "so that it may maintain continuing jurisdiction," 520 F.2d at 693, and the district court has done so through the issuance of numerous orders since its original opinion was filed. That is, of course, consistent with the general principle that where injunctive relief is granted, the litigation is not terminated since the court retains inherent power to modify its continuing equitable decree. See Riley v. Phillips Petroleum Co., 427 F.2d 19, 23 (10th Cir. 1970). It is those subsequent decrees, issued as part of the same litigation, that are the subject of the pending petitions to review the Ninth Circuit. The original litigation never became final for res judicata purposes. Accordingly, the doctrine of res judicata does not foreclose this Court from reviewing the correctness of the Ninth Circuit's or the Washington Supreme Court's decisions.

B. Law of the case

Nor does the "law of the case" doctrine pose a barrier to this Court's review of the treaty interpretation issue. Although the rulings of a state or federal appellate court consistute the "law of the case" for that court in the event of a second appeal, they are not binding on this Court, even though it may have denied a petition for certiorari from the first judgment of the Court of Appeals.[4] See, e.g., Mercer v. Theriot, 377 U.S. 152, 153-54 (1964); Reece v. Georgia, 350 U.S. 85, 87 (1955); Burnet v. J. Rogers Flannery & Co., 286 U.S. 524 (1932); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923); Messinger v. Anderson, 225 U.S. 436, 444 (1912); Panama R.R. v. Napier Shipping Co., 166 U.S. 282, 283-84 (1897). See also Zdanok v. Glidden Co., 327 F.2d 944, 951 n. 9 (2d Cir. 1964); White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940); 1B J.

---

[4] Of course the denial of certiorari in United States v. Washington cannot be construed as a decision on the merits. Hughes Tool Co. v. TWA, 409 U.S. 363, 365 n. 1 (1973).

Moore Federal Practice ¶ 0.404 at 574 (2d Ed. 1975); 9 J. Moore, Federal Practice ¶ 110.25[2] at 275 (2d Ed. 1975). As this Court said in Reece v. Georgia:

> We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case.

350 U.S. at 87 (citations omitted). Under these principles the Court has on a number of occasions granted certiorari and decided issues that had been the subject of an earlier appellate court ruling which it had declined to review. See, e.g., Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977); Hughes Tool Co. v. TWA, supra; Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 257-58 (1915); Scott v. United States, 46 U.S.L.W. 4433 (U.S. May 15, 1978); Falk v. Brennan, 414 U.S. 190 (1973); and Porter Co. v. NLRB, 397 U.S. 99 (1970). Accordingly, whether or not the Ninth Circuit panel considered itself bound by the "law of the case" doctrine, the door is open for this

Court to consider the treaty issue in these latest proceedings.

CONCLUSION

For the foregoing reasons, petitioners herein urge this Court to grant writs of certiorari to review the opinions of the Ninth Circuit Court of Appeals and the Washington State Supreme Court, and the Findings of Fact, Conclusions of Law and Injunction issued in 1978 by the district court.

Respectfully submitted,

JOSEPH T. MIJICH/JOHN P. WORLD

Attorneys for Petitioner
Purse Seine Vessel Owners
Association

CHARLES E. YATES
MORIARTY, LONG, MIKKELBORG
& BROZ

Attorneys for Petitioner
Puget Sound Gillnetters
Association